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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 55

A. E. McDONALD, PETITIONER,

vs.

ERNEST O. THOMPSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 21, 1938.

CERTIORARI GRANTED OCTOBER 10, 1938.

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CAPTION.

BE IT REMEMBERED that at a term of the District Court of the United States for the Northern District of Texas, begun and holden at Fort Worth, Texas, on the 9th day of March, A. D. 1936, and which term adjourned on the 31st day of October, A. D. 1936, the Honorable James C. Wilson, United States District Judge, presiding, the following cause came on for hearing and was heard, to-wit:

No. 864 In Equity.

A. E. McDONALD,

versus

ERNEST O. THOMPSON, ET AL.

BILL OF COMPLAINT.

Filed Jan. 17, 1936.

In the District Court of the United States for the Northern District of Texas, Fort Worth Division.

A. E. McDonald, Complainant,
vs. No. 864—In Equity.
Ernest O. Thompson, et al., Respondents.

To the Honorable Judge of said Court:

Comes now A. E. McDonald, hereinafter styled complainant, and files this his Bill of Complaint against the following named Respondents, Ernest O. Thompson, C. V. Terrell, Lon A. Smith, Walton D.

Hood, W. B. Renfro, and Tom Miller, and would respectfully show to the Court:

I.

That your complainant is an individual residing and domiciled in the City of Waxahachie, Ellis County, Texas; that the respondents, Ernest O. Thompson, C. V. Terrell, and Lon A. Smith are the duly elected, qualified, and acting Railroad Commissioners of the State of Texas, said Ernest O. Thompson being the chairman thereof, and that at all times herein mentioned they have composed and now compose and constitute the full membership of the Railroad Commission of Texas; that the respondent, Walton D. Hood is the chief law enforcement officer and chief of inspectors for the Railroad Commission of Texas; and that the respondents, W. B. Renfro and Tom Miller are inspectors and employees of the Railroad Commission of Texas, with the duties of enforcing the motor carrier law both as to the movement of property and passengers within the State of Texas. That the respondents, Ernest O. Thompson, C. V. Terrell, Lon A. Smith and Walton D. Hood are each residents of the City of Austin, Travis County, Texas; that the respondent, W. B. Renfro, is a resident of
3 the City of Fort Worth, Texas, and the respondent, Tom Miller, is a resident of the City of Dallas, Dallas County, Texas; each of the last named respondents being within the Northern District of Texas.

II.

That this Court has jurisdiction of this cause of action in that this controversy arises under the Constitution and the laws of the United States of America and involves a Federal question, the controversy herein

arising from the following facts as will hereinafter more fully appear, complainant herein asserting that he has for many years operated motor trucks in the transportation of property as an interstate common carrier for hire; that he had been regularly operating as such interstate common carrier by motor vehicle for hire for many years prior to June 1, 1935, and at all times since June 1, 1935, and that this controversy involves complainant's right to continue to so operate as an interstate common carrier for hire by motor vehicle over the highways of the States of Texas and Oklahoma under the interestate commerce clause of the Federal Constitution, and especially by reason of the enactment by the Federal Congress of Senate Bill No. 1629 which is an act to amend the Interstate Commerce Act as amended by providing for the regulation of the transportation of passengers and property by motor carriers operating in interstate or foreign commerce, which Act is some times referred to as the Motor Carrier Act of 1935. That the sum of more than $3,000.00 is involved in this controversy in that if the injunctive relief herein prayed for should be denied this complainant will in consequence thereof suffer irreparable damages in the sum of more than $3,000.00 as will be more definitely shown herein, and that the matter in controversy, exclusive of interest and cost, in value exceeds the sum of $3,000.00, and that, as will be more definitely shown herein, complainant has no plain, adequate, and complete remedy at law.

4 III.

That at all the times herein mentioned complainant or his predecessor in interest, so far as the same relates to the use of the highways of the State of Oklahoma, was and now is engaged in the business of transporting property in motor vehicles through and between the State of Texas and Oklahoma and by reason of

connections with other common carriers by water at the Port of Houston from various other states of the United States of America into and through the States of Texas and Oklahoma and between intervening points situated in different states, but is not engaged in transporting any property for hire between two points within the same state. That complainant has for several years and both prior to and subsequent to June 1, 1935, accepted and transported freight originating at shipside at the docks in Houston, Texas, originating in states other than the State of Texas and moving in interstate commerce through the Port of Houston to various points within the State of Texas and Oklahoma, and has for several years both prior to June 1, 1935 and subsequent to June 1, 1935, transported various commodities from various points within the State of Texas, and especially from the cities of Fort Worth, Dallas, and San Antonio to Houston, Texas, where the same is destined to points outside of the State of Texas, and where its journey is ordinarily continued by water routes to various states other than the states of Texas and Oklahoma, and to foreign countries. That complainant has in such transportation, both prior to and subsequent to June 1, 1935, especially used within the State of Texas highways designated as Federal Highways Nos. 75, 77, 80, 81, 290, 90 and 281, and that all of the highways he has used within the State of Texas have been Federal aided highways and that within the State of Oklahoma complainant, or complainant's predecessor in interest, has used various highways within the State of Oklahoma and has been authorized to use any and all highways within the State of Oklahoma in the transportation of property moving in interstate com-

5 merce. That a great many, if not all, of the the highways used in the State of Oklahoma are Federal aided and Federal designated highways, and that practically all, if not all, of the highways used both in the States of Texas and Oklahoma have been designated as Federal Highways constructed, re-

paired, and maintained in whole or in part by what is known as Federal funds provided by the United States Government. That over said interstate routes complainant is engaged in transporting property for hire to and from points within the State of Texas to and from points within other states of the United States as aforesaid, but is not engaged in transporting property nor does he desire to engage or hold himself out as engaging in the transportation of property between points within the State of Texas. That complainant was thus engaged during all of the times herein mentioned and as hereinbefore alleged, and has been engaged exclusively in the transportation of property in interstate commerce and is not engaged in any intrastate transportation or business within the State of Texas or within any other state of the United States of America.

IV.

That by an act of the Congress of the United States of America generally known and commonly referred to as the Motor Carrier Act of 1935 (Senate Bill No. 1629), approved August 9, 1935, by its terms effective on and after the first of October, 1935, the sole and exclusive jurisdiction, power, and authority to regulate the transportation of all passengers and property by motor vehicles operating in interstate commerce has been vested in and is now vested in the Interstate Commerce Commission of the United States. Said Act is, as hereinabove alleged, known as "An Act to amend the Interstate Commerce Act as amended by providing for the regulation of the transportation of passengers and property by motor carriers operating in interstate or foreign commerce, and for other purposes."

6 V.

That under the provisions of said Act of Congress complainant will be entitled to apply for and to

receive from the Interstate Commerce Commission a certificate of public convenience and necessity and such permits as will entitle complainant to continue his operations over said various highways in the transportation of property and goods moving in interstate commerce, and that complainant, under the terms and provisions of said Act, will be entitled to receive said certificate and such permits as hereinbefore alleged as a matter of right and especially under the provisions of Section 206 of said Act which provides among other things as follows:

"Provided, however, that, subject to Section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect."

That under said Act as amended the time for applying for said certificate or permit has not expired, and under the terms of the Act would not and will not expire until the 29th day of January, 1936, but that by an order of the Interstate Commerce Commission extending the effective date of section 206 of the aforesaid Act, the time for applying for said certificate or permit has not expired and will not expire until

the 12th day of February, 1936, and that your complainant is now engaged in taking active steps to secure said certificate and any permits that may be needed, and to apply for and file the proper application therefor. That your complainant has practically completed his application for filing and that the same will be filed with the Interstate Commerce Commission within the next ten days and within the time prescribed by the aforesaid Act of Congress.

That no certificates or permits have yet been issued and that the time for the issuance of such certificates or permits under and pursuant to said Act as amended has not yet arrived. That the jurisdiction over the regulation and control of the transportation by motor vehicle of passengers and property in interstate commerce, nevertheless, now exclusively rests in the Interstate Commerce Commission. That as hereinbefore alleged, your complainant was so engaged in said transportation of property for hire as a common carrier for several years prior to June 1, 1935, and has at all times since June 1, 1935, been so engaged in such a way as to entitle your complainant to apply for and to receive said certificate or permit from the Interstate Commerce Commission under that portion of said Section 206, as hereinabove set out, commonly referred to as the "Grandfather Clause." That under the terms and provisions of said Act your complainant is now entitled to continue in the transportation of property as a common carrier without such certificate or permit until such time as the Interstate Commerce Commission may act upon the aforesaid application or until otherwise ordered by the Interstate Commerce Commission. That your complainant has complied with all the requirements of the aforesaid Act of Congress, or is attempting to comply therewith, by filing the aforesaid application, and has at all times herein mentioned complied with all the appropriate and applicable police regulations of the State of Texas with reference to his aforesaid operations in interstate commerce.

VI.

That the respondents, Railroad Commissioners and their duly authorized agents, Walton D. Hood and W. B. Renfro, and Tom Miller, as well as all other agents and representatives of the said Railroad Commissioners of the State of Texas, and especially the Chief Law enforcement officer and chief of inspectors, Walton D. Hood, purporting to act under and pursuant to certain statutes of the State of Texas, particularly Chapt. 277, page 408, Acts of the 42nd Legislature, are attempting to exercise the
8 same control and power of regulation of the complainant in the conduct of his interstate transportation business within the State of Texas as has been exclusively vested in the Interstate Commerce Commission by the aforesaid Act of Congress. That because your complainant has not received from the Railroad Commission of Texas a certificate of convenience and necessity under and pursuant to said Texas statutes, the Railroad Commission of Texas and the members thereof, and the other respondents herein named, have refused to issue and deliver to your complainant the license tags or numbers that are required by the Railroad Commission to be affixed to all motor vehicles carrying property in the transportation business for hire as common carriers in the State of Texas. That the respondents, Railroad Commissioners and especially the respondent Walton D. Hood, law enforcement officer and Chief of inspectors for the Railroad Commission of Texas, have issued order and instructions to all inspectors as well as to the Texas State Highway Patrol, and to all law enforcement officers to, on and after January 15, 1936, arrest all drivers and stop all trucks, and to file charges against your complainant and all of the drivers of his trucks, and that chief law enforcement officer, Walton D. Hood, and the respondents, W. B. Renfro and Tom Miller, as well as all other inspectors who are

agents, officers and representatives of the Railroad Commission of Texas, are threatening to and will, unless enjoined by this Honorable Court, arrest your complainant and all of your complainant's truck or motor vehicle drivers, and stop all of your complainant's trucks or motor vehicles from operating in interstate commerce within the State of Texas, and will file criminal complaints against your complainant and all of your complainant's drivers of trucks or motor vehicles, and that the respondent, Walton D. Hood, has not only issued instructions to all officers, as hereinbefore alleged, directing that all of your complainant's trucks or motor vehicles be stopped, drivers arrested, charges filed, etc., but that said re-
9 spondent, Walton D. Hood, has by word of mouth directly told your complainant's counsel and threatened to your complainant's counsel to see that all of your complainant's operations and transportation of property in interstate commerce was completely stopped and prohibited in the State of Texas, and that all trucks would be stopped, that all drivers would be arrested, and that charges would be filed.

VII.

Your complainant alleges, as he has hereinbefore alleged, that he has complied with and is complying with all of the requirements of the Federal motor carrier act of 1935, and with all rules and regulations or other requirements as prescribed by the Interstate Commerce Commission as fast as said rules or regulations are promulgated or made known to your complainant through appropriate orders of the Interstate Commerce Commission, and that your complainant has complied with all of the police requirements of the State of Texas and has at all times herein mentioned and for several years past has complied with all police requirements of the State of Texas to permit him to

operate in interstate commerce, but that nevertheless respondents and each of them have threatened to and will unless enjoined by this Honorable Court, stop your complainant from operating in interstate commerce within the State of Texas and will arrest your complainant's drivers and file charges against them, and will stop your complainant's trucks from operating in interstate commerce notwithstanding complainant's compliance with the Federal motor carrier Act of 1935, and all appropriate and applicable police requirements of the State of Texas. That your complainant now has trucks loaded at his docks at Waxhachie, Texas, and at other points within the State of Texas with commodities and property generally moving strictly and exclusively in interstate commerce, but that your complainant is and has always been and endeavored to be a law abiding citizen and does not wish to either subject himself to arrest and criminal prosecution, nor subject his drivers to arrest and criminal prosecution, nor have his trucks and the commodities moving exclusively in interstate commerce stopped and delayed and deliveries not made, and that by reason of such facts and the acts, conduct, and threats of the respondents herein your complainant is not today permitting said trucks to go on the highways for fear of said criminal prosecutions and arrests, although your complainant by reason thereof is suffering and will suffer irreparable injury and damage such as to entitle your complainant to the injunctive relief herein sought under the Constitution and Statutes of the United States of America.

VIII.

Your complainant, as heretofore alleged, has been engaged exclusively in the transportation of property in interstate commerce for several years and for a long time prior to June 1, 1935, and at all times since

June 1, 1935, during which time your complainant has built up and now enjoys a lucrative transportation business amounting in net revenues to many thousand dollars per year, and far exceeding the sum of $3,000.00; that the value of the certificate your complainant is entitled to receive is a highly valuable right exceeding many times the sum or $3,000.00, but that if respondents are permitted to arrest and prosecute your complainant, stop your complainant's trucks and arrest your complainant's drivers and prosecute them, that your complainant's interstate transportation business will not only be destroyed, but that such acts and conduct upon the part of respondents herein will jeopardize and destroy the right and possibility of your complainant's receiving from the Interstate Commerce Commission the certificate to engage in interstate commerce as hereinbefore alleged. That in connection with complainant's application for a certificate of convenience and necessity from the Interstate Commerce Commission, your complainant desires to show and he will show and such showing will inure to his benefit that he or his immediate predecessor in interest has maintained continuous service over his interstate routes; that he will be unable to show that he has maintained such continuous service if he is subjected to arrests and criminal prosecutions and his trucks are stopped by the respondents or other law enforcement officers and interruptions are thereby occasioned in your complainant's service.

11

IX.

That notwithstanding the said respondents, as hereinabove alleged, have no jurisdiction, right, or authority whatsoever to prevent your complainant's trucks and motor vehicles from operating in interstate commerce within the states of Texas and Oklahoma, yet your complainant has in every way endeavored to

comply with and has complied with all the laws of the State of Texas in the following manner:

1. That complainant has caused public liability and property damage insurance to be issued and that the same is now in full force and effect, and has at all times herein mentioned been in full force and effect upon each and all of his trucks which he operates within both the states of Texas and Oklahoma in the amounts required by the Railroad Commission of Texas and the Corporation Commission of the State of Oklahoma, which fact is a matter of record in the files of each of said Commissions..

2. That the trucks which your complainant operates now and has operated at all times herein mentioned through the State of Texas are in excellent mechanical condition; they are properly registered for operation in the state in which they operate under the registration laws of the State of Texas; they have complied with all of the requirements of the laws of the State of Texas as to length, width, height, breaking and lighting equipment as well as all other mechanical requirements of the laws of the State of Texas, and that said trucks are in every way suitable to safely operate upon the highways and to transport property within and through the State of Texas, of which fact the respondents are well informed and acquainted.

12 3. That your complainant has offered to comply with every appropriate and applicable law of the State of Texas, and all rules and regulations of said Railroad Commission of Texas.

Notwithstanding the foregoing facts, the respondents and each of them are threatening to and openly stating that they will stop your complainant's trucks so engaged in interstate commerce in the transportation of property for hire.

X.

That prior to June 1, 1935, and at all times since June 1, 1935, your complainant has been engaged in the transportation of propefty moving in interstate commerce exclusively, and now seeks to continue to engage in said business under the provisions of the Federal Motor Carrier Act of 1935. He has built up a lucrative interstate transportation business; that the very essence of his business of transporting property in interstate commerce for hire is the ability of your complainant to maintain his service and that if his service is delayed, or if he is unable to continue such service for any length of time by reason of respondent's stopping his trucks and arresting his drivers, the confidence of the shipping public will be destroyed, together with their patronage, and the threatened acts and conduct of said respondents if carried out will prevent the maintenance of said service and result in demoralizing and destroying your complainant's business, and will further result in irreparable injury.

XI.

Your complainant has no plain, speedy, and adequate remedy at law in that the wrong complained of will cause collateral and consequential damages which are not compensable at law, and the full damage that will be suffered by your complainant cannot be recovered at law, and any legal remedy available would be attended by uncertainties, unreasonable delays, and irretrievable pecuniary loss, and unless the respondents are restrained the wrong complained of will be completed.

13

XII.

That immediate and irreparable injury, loss, and damage in an amount of not less than $50,000.00 will

result to your complainant before notice of any application for preliminary injunction can be served and a hearing had thereon, unless relief is granted by this Court in the form of a temporary restraining order against the respondents restraining them from doing the things herein complained of, and from in any way interfering with your complainant in causing his trucks or any of them to operate in interstate commerce and traversing the highways of the State of Texas. That your complainant has invested large sums of money in equipment of the value of not less than $10,000; has invested large sums in obtaining the insurance hereinabove referred to; has established docks and warehouses in various cities in the States of Texas and Oklahoma, especially including the cities of Houston and San Antonio, Waxahachie, Fort Worth and Dallas within the State of Texas, the terminal and dock facilities at Waxahachie being owned by your complainant and your complainant being liable under contract for large sums of money by way of lease and rentals at other points herein mentioned; that he has employed approximately 25 people as bookkeepers, shipping clerks, drivers, and in various other capacities, and has invested considerable sums of money in printing in way bills, bills of lading, reports, and report books, and such other equipment as is usual, customary, and commonly used in such business, and that his actual daily payroll during such time as he might be stopped by the respondents from operating amounts to approximately $100.00 per day. That your complainant is fully prepared and ready to and will transport property in interstate commerce and that such property has already been tendered and is now being tendered to your complainant for transportation in interstate commerce. That your complainant has already accepted for transportation and contracted with various people to transport their property in interstate commerce and that the action of the respondents in stopping your complain-

ant's trucks and preventing them from traversing the highways of the State of Texas have and will cause great and irreparable injury and damage to complainant, and especially in that your complainant will not be permitted to proceed with his business and to transport property of those for whom he has been regularly transporting property and for those who have tendered and are now tendering your complainant property to transport as well as all other property which complainant would be engaged to transport, and complainant will be greatly and irreparably damaged in his capital investment as above set out, which will be rendered of practically no value whatsoever, and he will be deprived of his goods and profits which he would otherwise have made in the transportation of such property for hire in interstate commerce.

XIII.

That the aforesaid acts of the respondents and each of them, together with their agents acting under their direction as above set out and the threatened continued action interfering with the conduct of complainant's business of the transportation of property in interstate commerce as a common carrier, are unlawful, arbitrary, and wholly without sanction of law, State or Federal, and constitute an invasion of your complainant's rights guaranteed to him under the laws of the Constitution of the United States in the following particulars:

1. That said acts and conduct of respondents deprives your complainant of his rights under the Constitution and laws of the United States vesting in the Congress of the United States exclusive jurisdiction over the regulation of interstate and foreign commerce and in that way the respondents are violating and threaten to violate to the complainant's irreparable

damage, complainant's rights under the Commerce Clause of the Federal Constitution.

2. That said action and threatened action and conduct constitute an unlawful deprivation of the complainant's property and property rights guaranteed to him under the Due Process Clause of the 14th Amendment to the Constitution of the United States.

15 Wherefore, complainant prays that this Honorable Court issue a restraining order restraining the respondents individually and in their official capacities, their agents, servants, representatives, and employees, and either, any, and all of them, from causing either directly or indirectly, or causing in any way the molestation, arrest, or interference with the drivers of your complainant's trucks, and from in any manner restraining or interfering with the operation of any truck belonging to your complainant while engaged in interstate commerce, and from in any way impeding, hindering or interfering with the complainant's business in the transportation of property in interstate commerce in any manner whatsoever; and that a hearing be had and a temporary injunction be decreed with like restraint against said respondents and their agents, servants, representatives, and employees, and upon final hearing hereof that said temporary injunction be made permanent, for costs, and for such other and further relief, premises considered, as to the Court may seem just.

PRICE AND CHRISTOPHER,
WILLIAM E. DAHL,
Attorneys for Complainant.

The State of Texas,
County of Tarrant.

Before me, the undersigned authority, on this day personally appeared T. S. Christopher, one of the attorneys of record and attorney in fact for the complain-

ant, who as such has cognizance of the matters stated in the above and foregoing pleading, who being by me first duly sworn on his oath says that he is authorized to make oath to the foregoing Bill in Equity for Temporary Restraining Order and Temporary Injunction, that he knows the contents thereof, that he is familiar with and knows the facts therein alleged, that the allegations contained therein are true, except such matters as may be stated on information
16 and belief, and as to such matters he believes them to be true.

T. S. CHRISTOPHER.

Subscribed and sworn to before me on this the 17th day of January, A. D. 1936.

EDNA LEFLER,
Notary Public, Tarrant County, Texas.

FIAT OF JUDGE GRANTING TEMPORARY RESTRAINING ORDER.

17 Filed Jan. 17, 1936.

(Title Omitted.)

The within Bill of Complaint having been presented to and heard by the Judge of this Court at Chambers this 17th day of January, 1936, and it appearing to him from the facts therein stated that the complainant will suffer immediate and irreparable damages, and especially in that complainant may lose the valuable right of receiving a certificate from the Interstate Commerce Commission to operate a transportation service in interstate commerce if there is any interruption in his service; and further, especially in that if such facts should occur that valuable properties owned by the

complainant would become practically worthless; and further in that any interruption in service would tend to destroy the confidence of the general shipping public and greatly impair, if not destroy complainant's business; and further in that any interruption of service would prove extremely expensive to complainant without any return whatsoever therefrom, it appears from the complainant's Bill of Complaint that complainant is entitled to a Temporary Restraining Order, which same is within complainant's allegations and prayer; that delay will not be injurious to respondents, and that justice will be subserved by the granting of the Temporary Restraining Order prayed for.

It is Therefore Ordered that the respondents, Ernest O. Thompson, C. V. Terrell, Lon A. Smith, Walton D. Hood, W. B. Renfro, and Tom Miller, and each of them, individually and in their official capacity, their agents, servants, representatives, and employees, and either, any, and all of them, be and the same hereby are restrained from causing either directly or indirectly, or causing in any way the molestation, arrest, or interference with complainant's drivers and trucks, and from in any manner interfering with the operation of any trucks belonging to complainant while engaged in interstate commerce, and from in any way impeding, hindering, or interfering with complainant's business in the transportation of property in interstate commerce in any manner whatsoever upon complainant's executing in behalf of the respondents a bond with good and sufficient sureties in the sum of $1,000.00, conditioned as the law requires.

18

It is Therefore Ordered that the respondents, and each of them, shall appear in the Court room of the above named Court on the 24th day of January, 1936, to show cause, if any there be, why a Temporary Injunction should not be granted upon such Bill of Complaint effective until final decree in this suit.

Service of a certified copy of the complainant's bill herein and of this order will constitute good and sufficient service of the bill and this Temporary Restraining Order.

Dated this 17th day of January, A. D. 1936.

JAMES C. WILSON,
Judge United States District Court, Northern District of Texas.

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19 RESPONDENTS' MOTION TO DISMISS.

Filed Jan. 24, 1936.

(Title Omitted.)

To the Honorable Judge of said Court:

Now come the respondents, Ernest O. Thompson, C. V. Terrell, Lon A. Smith, Walton B. Hood, W. B. Renfro, and Tom Miller, and move the Court to dismiss the bill of complaint herein filed against them upon the following grounds, to-wit:

I.

The bill of complaint fails to state facts sufficient to constitute a cause of action in favor of complainant and against these defendants.

II.

The bill of complaint does not state facts sufficient to constitute a valid cause of action in equity against these respondents, either severally or jointly.

III.

It appears on the face of said bill of complaint that said bill of complaint is wholly without equity.

IV.

It appears on the face of the bill of complaint that complainant is not entitled to the relief prayed for in said complaint against these respondents, nor to any relief against these respondents arising from the facts alleged in said complaint.

20

V.

It appears from the bill of complaint that complainant is seeking to enjoin these respondents in their official capacities as officials of the State of Texas from performing and carrying out their statutory duties to protect, preserve and maintain certain property belonging to the State of Texas, to-wit, the public highways within the State of Texas, and, therefore, the complainant is not entitled to any relief.

VI.

It appears on the face of the bill of complaint that complainant is seeking to require these respondents as officials of the State of Texas to permit complainant to use certain property belonging to the State of Texas, to-wit, its highways, without at the same time applying to the Railroad Commission of Texas for a certificate of convenience and necessity, and upon hearing of such application proving or offering to prove that the highways in the State of Texas in their present state of repair sought to be traversed by applicant will stand the additional traffic burden that will be im-

posed thereon by the proposed motor carrier bus operation of applicant, (complainant herein), and without proving or offering to prove that the extraordinary use of the highways sought to be made by applicant will not impair the safe use of the highways of the State of Texas by the ordinary traveling public.

VII.

It appears from the face of the bill of complaint that complainant herein is contending that under and by virtue of the passage of the Motor Carrier Act, 1935, by Congress, that all State motor carrier regulatory laws, the jurisdiction of all State motor carrier regulatory officials and bodies, and all valid orders, rules and regulations that have been promulgated by such State regulatory officials and bodies have been superseded by the passage of the said Motor Carrier Act, 1935, by Congress, in so far as interstate commerce motor carrier operations are concerned,
21 as in such Act defined, and that the State of Texas, even though it is the builder and owner of its highways, has no right, authority or power to impose reasonable police regulations upon interstate commerce motor carrier operators for compensation and hire over its highways to effect the safe use of its highways by the ordinary traveling public, and to effect the preservation of its highways in a reasonable and suitable condition of repair; and while it is the contention of these respondents that such a construction intended to be placed on the Motor Carrier Act, 1935, by complainant is erroneous in the event, and only in the event, that this Court holds that such construction of the Motor Carrier Act is proper, these respondents insist that the Motor Carrier Act, 1935, contravenes the Fifth Amendment of the Constitution of the United States in that it takes private property, to-wit, the highways of the State of Texas, for a public use, to-wit,

interstate commerce motor carrier operations for compensation and hire, without just compensation therefor, and that said Motor Carrier Act, 1935, is under such construction unconstitutional and void.

Wherefore, these respondents pray that their motion to dismiss be sustained and that they be dismissed with their costs in this behalf incurred.

WILLIAM McCRAW,
Attorney General of Texas,
CURTIS E. HILL,
Assistant Attorney General,
Counsel for Respondents.

RESPONDENTS' FIRST AMENDED ANSWER.

22 Filed April 30, 1936.

(Title Omitted.)

To the Honorable Judge of said Court:

Now comes respondents, Ernest O. Thompson, C. V. Terrell, Lon A. Smith, Walton D. Hood, W. B. Renfro and Tom Miller, and after first having had and obtained leave of the Court and file this their first amended answer in lieu of all answers heretofore filed herein, except their motion to dismiss and subject only to the action of the Court upon their motion to dismiss, and without waiving same but still insisting upon same, and file and present the following answer to the plaintiff's bill of complaint:

I.

Answering Paragraph I of complainant's bill, they admit the allegations contained therein.

II.

Answering Paragraph II, they admit the allegations of Paragraph II in so far as the nature of the controversy involved is concerned, but deny that complainant has been engaged in a bona fide operation as Common Carrier for hire in interstate or foreign commerce either prior to June 1, 1935, or since said time.

23

III.

Answering Paragraph III, of complainant's bill, they have no knowledge as to complainant's operations or use of the highways in the State of Oklahoma, or of his right and authority to operate in that State, and neither admit or deny his allegations in this respect, but deny that complainant is not engaged in the transportation of property for hire between points within the State of Texas, and allege the fact to be, that complainant for several years prior and subsequent to June 1, 1933, has been transporting commodities between various points within the State of Texas over the highways thereof in violation of the laws of the State, and in such transportation admit that he has operated over Federal Highways 75, 77, 80, 81, 290, 90, and 281. They deny that all of the highways which complainant has used within the State of Texas are federal aided highways, and neither admit or deny that he was authorized to use said highways within the State of Oklahoma, but deny that he had any authority to use said highways within the State of Texas, and allege the fact to be that he has been doing so in violation of the laws of the State of Texas. They deny that complainant has not engaged in and has not held himself out as engaging in the transportation of property between points within the State of Texas and over the highways thereof in violation of the law.

IV:

Answering Paragraph IV of complainant's bill, they admit the passage of the Motor Carrier Act of 1935, by the Congress of the United States, but deny that by the passage of said Act jurisdiction, power and authority to determine as to whether or not complainant and other parties desiring to use the highways of Texas shall be permitted to do so has been superceded by the passage of said Act by Congress, but allege the fact to be that notwithstanding the passage of said
24 Act by Congress, the respondent Railroad Commission, still has the jurisdiction and power to prohibit the use of the highways of Texas for the transportation of property for hire if such highways are not of proper construction or in proper condition to maintain said traffic, or if the contemplated use of said highways by the complainant would increase the dangers and hazards on said highways and congest the traffic thereon and unreasonably interfere with the use thereof by the public, and respondents further say that Article 911a, Vernon's Annotated Civil Statutes 1925, commonly referred to as the "Motor Carrier Bus Law of Texas" and Article 911b Vernon's Annotated Civil Statutes 1925, commonly referred to as the "Motor Carrier Truck Law of Texas," so far as such statutes effect the physical preservation of public highways of Texas and prevent an unreasonable interference by motor carriers for compensation and hire operated thereover with the use of such highways by the ordinary traveling public, were, at the time of their enactment, and now are, proper, reasonable, and necessary police regulations of the State of Texas, regulating the use of the public highways by Motor Carriers for compensation and hire thereover, and such statutes now remain in full force and effect to the extent that same effect the regulation of the use of the public highways of the State of Texas by Motor Carriers thereover for compensation and hire, whether

operating in intrastate commerce or interstate commerce, notwithstanding the passage of the Motor Carrier Act of 1935.

V.

Answering Paragraph V of complainant's bill, they deny that complainant is entitled to operate over the various highways of the State of Texas in the transportation of property and goods moving in interstate commerce, and that he is entitled to receive a certificate under said Act of Congress as a matter of
25 right under the provisions of Section 206 of said Act, for the reason as respondents allege that said complainant was not "in bona fide operation as a Common Carrier by motor vehicle on June 1, 1935," within the State of Texas and over the highways thereof, and deny that complainant under said Act has until the 12th day of February, 1936, within which to file an application with the Interstate Commerce Commission for a Certificate to engage in said transportation. They neither admit or deny that the complainant has taken active steps to secure said certificate, nor that he has practically completed his application and that same will be filed within the next ten days; they deny that complainant is entitled to a Certificate from the Interstate Commerce Commission under what is known as the Grandfather Clause of the Act of Congress, for the reason that said complainant is not now and never has been a bona fide operator as a Common Carrier for hire over the highways of the State of Texas, and therefore is not entitled to continue in such transportation until such time as the Interstate Commerce Commission may act upon any application which he may file. They deny that complainant has complied with all of the requirements of the Act of Congress and specifically deny that he has complied with all of the appropriate and applicable police regulations with the State of Texas with refer-

ence to his claimed operations in Interstate Commerce, but allege the fact to be that all of the operations of the complainant, except those hereinafter specifically mentioned, within the State of Texas have been consistently in violation of the laws of the State of Texas, and without any Certificate or Permit from the respondent Railroad Commission, as the law requires.

26

VI.

Answering Paragraph VI of complainant's bill, in this connection respondents allege that the following are the true facts in regard to complainant's operations within the State of Texas:

(a) In the year 1934 complainant filed with the respondent Railroad Commission of Texas an application for a Special Commodity Carrier Permit to haul *only* "livestock belonging to or being distributed by, or under authority of the Agricultural Department of the State of Texas between all Texas points," and under said application the respondent Railroad Commission of Texas on March 30, 1934, granted complainant a Permit to operate as a Special Commodity Carrier. A certified copy of the Order granting said permit being filed with this Answer as a part thereof, marked Exhibit "A"; that said Special Commodity Permit was on October 25, 1934, canceled by the Railroad Commission, as shown by certified copy of the Order canceling same, filed herewith, marked Exhibit "B" and made a part hereof.

(b) On the first day of May, 1934, complainant filed with the respondent Railroad Commission of Texas, an application for a certificate as a Common Carrier motor operator in Interstate Commerce, as shown by a certified copy of said application, filed herewith, marked Exhibit "C" and made a part hereof.

A hearing was had upon said application, after notice given, and testimony was introduced before said respondent, a copy of which is filed herewith, marked Exhibit "D," and made a part hereof. After said hearing and consideration of said application by the Commission, it entered its Order on July 14, 1934, denying said application, a copy of which is filed herewith, marked Exhibit "E" and made a part
27 hereof.

(c) Thereafter the complainant filed in the District Court of Travis County his appeal from said Order of the Commission denying his application, in a suit entitled E. A. McDonald v. The Railroad Commission of Texas, et al., No. 54134, in the District Court of Travis County, Texas, 98th Judicial District. A certified copy of his Petition in said cause is filed herewith, marked Exhibit "F", and made a part hereof. In said Cause the respondent Railroad Commission filed its Answer, a certified copy of which is filed herewith, marked Exhibit "G", and made a part hereof. Said Cause was heard by the District Court of Travis County, and judgment entered therein in favor of complainant, granting an injunction against the respondent Commission, a certified copy of which is filed herewith, marked Exhibit "H" and made a part hereof. The respondent Commission appealed from said judgment of the District Court to the Court of Civil Appeals of the Third Supreme Judicial District of Texas, and said Court reversed the Judgment of the Trial Court and dissolved the injunction which had been issued by said Court in favor of said complainant, as shown by certified copy of the Opinion of said Court, filed herewith, marked Exhibit "I" and made a part hereof. The time within which complainant had under the law to file a Motion for Rehearing in the Court of Civil Appeals has expired and therefore said Judge of the Court of Civil Appeals has become final.

(d) While said Appeal was pending in the Court of Civil Appeals complainant filed with the respondent Railroad Commission an application for a Common Carrier motor operator to engage in Intrastate Commerce within the State of Texas, as shown by certified copy of said application, filed herewith, marked Exhibit "J", and made a part hereof.

Wherefore respondents say that complainant, except as a special commodity carrier of livestock only is not now and never has been lawfully engaged in the transportation of interstate or foreign commerce over the highways of Texas, but all of his operations
28 in this respect have been in violation of the laws of the State and of the Orders of the respondent Railroad Commission.

Further answering Paragraph VI, respondents admit that they, acting under the statutes of the State of Texas and within the Act of Congress hereinbefore mentioned, are exercising their rightful powers of regulation of the complainant in the conduct of his transportation business within the State of Texas, and refused and still refuses to issue and deliver to him license, tags or numbers, for the reason that he has no authority to operate over the highways of this state, and they have threatened to and will arrest the drivers and operators of complainant unless and until he complies with the laws of the State of Texas in securing a certificate to operate over the highways thereof, either as a transporter of interstate or intrastate commerce, which said exercise of the jurisdiction and authority is within their rights, jurisdiction and powers under the Act of Congress hereinbefore mentioned.

VII.

Answering Paragraph VII, respondents deny that complainant is complying now or has ever complied

with the police requirements of the State of Texas, so as to permit him to operate in interstate commerce.

VIII.

Answering Paragraph VIII, respondents deny that complainant has ever been lawfully engaged in the transportation of property in interstate commerce as a Common Carrier, but as to the other allegations in said Paragraph VIII, they neither admit nor deny same, having no knowledge thereof.

IX.

Answering IX, the respondents aver that they have jurisdiction and authority to prevent complainant's trucks and motor vehicles from operating in interstate commerce within the State of Texas, unless
29 and until complainant secures from said respondent Railroad Commission a certificate to so operate, and they deny that complainant has endeavored to comply with or has complied with any of the laws of the State of Texas in the transaction of his business. They specially deny that he has caused public liability and property damage insurance to be issued and that same is now in full force and effect. They neither admit nor deny the allegations in Subdivision 2 of Paragraph IX, as to the mechanical condition of complainant's equipment and say they have no knowledge of same, but they allege the fact to be as shown by the testimony introduced before the Commission in complainant's applications for a Common Carrier certificate to operate in interstate commerce, and in the findings of fact of said respondent Commission, that the highways of Texas over which complainant seeks to operate are not in such condition as to justify the issuance of any permit or certificate to him, and allege the fact to be

that said highways are now congested to the extent that his operation would unreasonably interfere with the uses thereof by the traveling public. They deny the allegations of Subdivision 3 of Paragraph IX, and allege the fact to be that complainant has not offered to comply with the appropriate and applicable laws of the State of Texas, and the rules and regulations of the respondent Commission.

X.

Answering Paragraph X, they deny that complainant prior to June 1, 1935, or at any time since, has been lawfully engaged in the transportation of property moving in interstate commerce, but as to the allegations relating to the extent of his business they have no knowledge, and neither admit nor deny same.

XII.

Answering Paragraph XII, respondent says that they have no knowledge as to the facts alleged therein, and neither admit nor deny same.

XIII.

Answering Paragraph XIII, respondents deny that their action, or threatened action is unreasonable, arbitrary and without sanction of law state or federal, but allege the fact to be that notwithstanding the passage of the Motor Carrier Law by Congress, the respondent Railroad Commission of Texas, still retains jurisdiction and authority to determine as to whether or not complainant may be permitted to operate over the highways of Texas in the transportation of interstate commerce, and to determine as to whether or not the highways of the state are of such construction, or the traffic thereon is in such congested condition as that

complainant's operations would unreasonably interfere with the use of said highways by the traveling public, said jurisdiction and authority not having been taken away or destroyed or lessened by said Act of Congress, and not intended to be so taken away, destroyed or lessened. In this connection these respondents say, in answer to the allegations of complainant as to any action or threatened action by them, that they still have the jurisdiction and authority notwithstanding the passage of the Federal Motor Carrier law to determine as to each application for a certificate to engage in interstate commerce over the highways of Texas the following facts: (1) as to whether or not the highways over which the applicant proposes to operate are of such construction, or are in such condition of repair as to reasonably justify the issuance of a certificate permitting such operation; (2) to determine as to whether or not the highways over which an applicant to engage in interstate commerce proposes to operate are in such a congested condition in relation to traffic and that to grant an application to engage in interstate commerce over said highways would unreasonably interfere with the use of said highways by the traveling public; (3) to require the applicant to carry sufficient amount of insurance to protect the traveling public over said highways from injury or damage
31 occasioned by such operation; and (4) to require such applicant to conform to all statutory regulations relating to the weight of the load upon the vehicles used, the height, width and length of said vehicles in use, and these respondents say that they have not attempted to exercise and do not claim to have the jurisdiction or authority to exercise any other powers than those herein claimed as to right of the complainant to engage in interstate commerce over the highways of this state, and their refusal to issue plates to complainant is based solely upon his failure to comply with the orders of the respondent Commission in enforcing its jurisdiction and authority as herein set

out. The respondent Commission says that should said complainant present to the Commission an application to transport property for hire in interstate commerce over the highways of this State that said Commission will hear said application; that in said hearing the respondent Commission will require the applicant to show by facts, circumstances and conditions that the highways proposed to be used by said applicant are capable of withstanding the proposed use without undue injury and damage to the said highways and without unreasonable interference with the use of said highways by the general public for ordinary purposes; that respondent Commission will not require said applicant to prove that public convenience and necessity requires the proposed service and that said Commission will not consider the adequacy of the existing transportation facilities, or the effect the proposed operation will have upon the existing transportation facilties in determining whether or not it will authorize said applicant to operate over the highways of this State, but that said Commission will refuse to issue plates, tags, identification cards and authority to use said highways

32 until said plaintiff has procured authority from the Interstate Commerce Commission to so operate.

Wherefore, respondents having fully answered herein they pray that complainant's bill be dismissed.

WILLIAM McCRAW,
Attorney General of Texas,
CURTIS E. HILL,
Assistant Attorney General of Texas,
Attorneys for Respondents.

33 The State of Texas,
County of Travis.

Before me, the undersigned authority on this day personally appeared Tilden L. Childs, who upon his

oath deposes and says; that he is familiar with the allegations of fact contained in the foregoing Answer, and that same are true.

TILDEN L. CHILDS.

Sworn to and subscribed before me, this the 23 day of April, A. D. 1936.

MRS. BEULAH BURNS,
(Seal) Notary Public in and for Travis County, Texas.

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34 DECREE.

Filed July 17, 1936.

In the District Court of the United States for the Northern District of Texas, Fort Worth Division.

A. F. McDonald, Complainant,
vs. No. 864 in Equity.
Ernest O. Thompson, et al., Respondents.

The above entitled and numbered cause came on for further and final hearing at this term of Court, and whereupon came all parties, both complainant and respondent, in person and by their attorneys, whereupon all matters both of fact and of law were submitted to the Court, and the Court, after hearing the pleadings, the evidence, and the argument of counsel thereon, and after consideration of the same, is of the opinion that both the law and the facts are with the complainant.

It is, Therefore, Ordered, Adjudged and Decreed that:

1: The temporary restraining order entered in this cause on the 17th day of January, A. D. 1936, be, and

the same hereby is made permanent and perpetual against the respondents and each and all of them.

2. Respondents and each and all of them, together with their servants, agents, representatives, and attorneys, are further permanently and perpetually restrained and enjoined as in complainant's bill
37 prayed, and in particular from causing either directly or indirectly, or causing in any way, the molestation, arrest, or interference with the drivers of complainant's trucks, and from in any manner restraining or interfering with any truck belonging to complainant while engaged in interstate commerce, and from in any way impeding, hindering or interfering with the complainant's business in the transportation of property in interstate commerce in any manner whatsoever.

3. It is further ordered, adjudged, and decreed that all costs herein, as taxed by the Clerk of this Court, be taxed against the respondents jointly and severally and by them paid for which execution may issue in favor of the officers of this Court.

Dated this, the 16th day of July, A. D. 1936.

JAMES C. WILSON,
District Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

36 Filed July 15, 1936.

(Title Omitted.)

Findings of Fact.

1. Complainant is a citizen of the State of Texas engaged in the transportation of property for hire over

the highways of the States of Texas and Oklahoma exclusively in interstate commerce.

2. Respondents, Ernest O. Thompson, C. V. Terrell, and Lon A. Smith, are the Railroad Commissioners of the State of Texas, collectively composing what is known as the Railroad Commission of the State of Texas. Respondent, Mark Marshall, is director of the Motor Transportation Division of the Railroad Commission of Texas, and Walton D. Hood, W. B. Renfro, and Tom Miller, are inspectors and law enforcement officers employed by the Railroad Commission of Texas, and act under the direction of the Railroad Commission of Texas.

3. The jurisdictional amount and threatened irreparable injury in the absence of relief by injunction have been established.

37 4. Respondents and each of them have caused the arrest of complainant's truck drivers and have delayed and tied up complainant's trucks, and have filed criminal complaints against complainant's drivers; and respondents and each of them threaten to and will continue in that way to interfere with and to put a stop to complainant's operations within the State of Texas.

5. That for a long time prior to June 1, 1935, and at all times since June 1, 1935, complainant has been continuously in bona fide operation engaged in the business of transporting property for hire over the highways of the States of Texas and Oklahoma exclusively in interstate commerce.

6. That in complainant's operation of motor vehicles over the highways of the State of Texas in the transportation of property for hire complainant used and now uses highways designated as Federal highways

Nos. 75, 77, 80, 81, 290, 90, and 281, and certain highways in the State of Oklahoma not the subject of controversy in this cause.

7. That all of the highways used by complainant are Federal aided highways except that portion of U. S. No. 281 between Three Rivers and Alice which is not on the Federal aided system, and that all of the highways hereinabove enumerated carry the above Federal designations.

8. That complainant filed an application with the Interstate Commerce Commission for an interstate certificate within the time fixed by the Federal Motor Carrier Act, 1935, or within the time required by the Interstate Commerce Commission of the United States under appropriate orders of said Interstate Commerce Commission extending the effective date of Section 206 thereof consistent with the terms of said Act.

38 9. That complainant has likewise filed with the Interstate Commerce Commission tariffs and rates as required by said Act and within the time for the filing of such rates and tariffs, or within the time prescribed and allowed by appropriate orders of the Interstate Commerce Commission consistent with the terms of said Act for the filing of such rates and tariffs.

10. That complainant has on file with the Railroad Commission of Texas public liability and property damage insurance approved by the Commission, or its authorized representative, as required by the Texas Motor Carrier Act (Acts 42nd Legislature, page 480, Chapt. 277, 1931.)

11. That complainant does not transport property moving in intrastate commerce.

12. That complainant's trucks have all been registered within the State of Texas under the requirements of Texas law; that all of said trucks are in good mechanical repair and condition; that all of said trucks are in such physical condition that they may be safely operated over the highways; and that all of said trucks in all respects comply with all police requirements under the applicable laws of the State of Texas; that complainant will suffer immediate and irreparable injury unless injunction issue from this Court as prayed for.

39 Conclusions of Law.

1. The Court concludes as a matter of law that this Court has jurisdiction of the parties and subject matter of this cause, and that the complainant has pleaded and proved jurisdiction and equity.

2. The Court concludes as a matter of law that what is known as the Motor Carrier Act, 1935, passed by the 74th Congress (Senate Bill 1629) became effective on August 9, 1935, except as to Section 227 thereof except to the power of the Interstate Commerce Commission to postpone the taking effect of any provision of the Act (other than Section 227) until such time after October 1, 1935, as the Commission shall prescribe, but not later than April 1, 1936; that said Act superseded the Texas motor truck laws (Acts 42nd Legislature, 1931, page 480, Chapt. 277) in so far as said Texas Act gave to the Railroad Commission of Texas power to forbid the use of Federal Highways Nos. 75, 77, 80, 81, 290, 90, and 281 by complainant's trucks when engaged exclusively in the transportation of property in interstate commerce.

3. The Court concludes that the phrase "if any such carrier or predecessor in interest was in bona fide

operation as a common carrier by motor vehicle on June 1, 1935" as used in Section 206 of the Motor Carrier Act, 1935 (Senate Bill 1629), properly construed relates to the actual physical continuous and regular operation of such carrier on June 1, 1935, and continuously ever since.

4. The Court concludes nevertheless that as a matter of law complainant was in bona fide operation on and prior to June 1, 1935, and has been continuously in such operation since said date.

40 5. The Court concludes that complainant has complied with all applicable police requirements of the State of Texas.

6. The Court concludes as a matter of law that complainant is entitled to a permanent injunction against the Railroad Commission of Texas and the individual members composing said Railroad Commission of Texas; Mark Marshall, the acting director of the Motor Transportation Division of the Railroad Commission of Texas; Walton D. Hood, W. B. Renfro, and Tom Miller, inspectors and law enforcement officers of the Railroad Commission of Texas together with all of their agents, representatives, and employees, enjoining and restraining respondents and each of them, their agents, employees, and representatives from molesting or in any way interfering with complainant's operation within the State of Texas in interstate transportation of property by motor truck for hire.

Dated and signed at Fort Worth, Texas, this 14th day of July, A. D. 1936.

JAMES C. WILSON,
United States District Judge.

41 MOTION TO AMEND DECREE.

Filed Oct. 13, 1936.

(Title Omitted.)

Now come the respondents in the above entitled and numbered cause and show to the Court:

I.

That by the decree made in this cause and dated the 16th day of July, A. D. 1936, it was decreed:

"The above entitled and numbered cause came on for further and final hearing at this term of Court, and whereupon came all parties, both complainant and respondent, in person and by their attorneys, whereupon all matters both of fact and of law were submitted to the Court, and the Court, after hearing the pleadings, the evidence, and the argument of counsel thereon, and after consideration of the same, is of the opinion that both the law and the facts are with the complainant.

It is Therefore Ordered, Adjudged and Decreed that:

1. The temporary restraining order entered in this cause on the 17th day of January, A. D. 1936, be, and the same hereby is made permanent and perpetual against the respondents and each and all of them.

2. Respondents and each and all of them, together with their servants, agents, representatives, and attorneys, are further permanently and perpetually restrained and enjoined as in complainant's bill prayed, and in particular from causing either directly or in-

directly, or causing in any way the molestation, arrest, or interference with the drivers of complainant's trucks, and from in any manner restraining or interferring with any truck belonging to complainant while engaged in interstate commerce, and from in
42 any way impeding, hindering, or interfering with the complainant's business in the transportation of property in interstate commerce in any manner whatsoever.

3. It is further ordered, adjudged, and decreed that all costs herein, as taxed by the Clerk of this Court, be taxed against the respondents jointly and severally and by them paid for which execution may issue in favor of the officers of this Court.

Dated this the 16th day of July, A. D. 1936."

II.

Said decree has been duly entered of record in the minutes of this Court.

III.

Such decree was so entered of record without any opportunity on the part of the respondents to read same and since the entry thereof these respondents have discovered that the said decree omits to recite: (1) The due order of procedure of the Court and the various steps taken in the hearing and determination of this litigation. (2) That respondents first presented their motion to dismiss complainant's Bill in Equity, which motion was by the Court denied, and to which action of the Court respondents excepted, all of which things were done.

IV.

Further, since the entry of said decree these respondents have discovered that the judgment grant-

ing the permanent injunction herein enjoins the respondents, and each and all of them, their servants, agents, representatives and "attorneys" from ..... "interferring with the complainant's business in the transportation of property in interstate commerce in any manner whatsoever," and it is apparent from the pleadings on file herein that respondents' attorneys are not parties to this law suit.

43 V.

Further, respondents have discovered that the decree heretofore entered herein does not recite that the respondents, each and all, severally excepted to the rulings of the Court as such rulings are reflected in such decree.

Wherefore, respondents move to the Court that the said decree may be corrected by amending same to comply with the above mentioned omissions and irregularities or that the Court make such other orders in the premises as to the Court may seem meet.

Dated this the 13 day of October, A. D. 1936.

WILLIAM McCRAW,
Attorney General of Texas,
CURTIS E. HILL,
Assistant Attorney General,
Attorneys for Respondents.

WAIVER OF SERVICE OF NOTICE OF MOTION TO AMEND DECREE.

44 Filed Oct. 13, 1936.

(Title Omitted.)

Respondents having filed their motion to Amend the Decree entered herein on July 16, 1936, and having

furnished the undersigned attorneys of record for complainant, A. E. McDonald, with a copy of such motion, the said complainant A. E. McDonlad, by his attorneys of record, hereby waives the service of a copy of such motion upon him or them and hereby agrees that such motion may be heard, considered, and acted upon at any time without further notice to him or them.

Dated this the 13 day of October, A. D. 1936.

A. E. McDONALD,
By T. S. CHRISTOPHER,
PRICE & CHRISTOPHER,
WM. E. DAHL,
Attorneys of Record for A. E. McDonald.

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45 ORDER AMENDING DECREE.

Filed October 13, 1936.

In the United States District Court for the Northern District of Texas, Fort Worth Division.

A. E. McDonald, Complainant,
vs. No. 864 in Equity.
Ernest O. Thompson, et al., Respondents.

Complainant having waived service of a copy of respondent's motion to amend the decree rendered herein on the 16th day of July, A. D. 1936, and complainant having agreed that such motion might be taken up for consideration at any time, such motion came on to be heard this the 13 day of October, A. D. 1936, and upon consideration thereof, it is ordered, adjudged and decreed that said motion be in all things

granted and that said decree be, and the same hereby is, amended to read as follows, to-wit:

The above entitled and numbered cause came on for hearing for preliminary injunction on January 25, 1936, and all parties, either in person or by their respective attorneys of record, appeared and announced ready on the preliminary injunction hearing; respondents' announcement being subject to their Motion to Dismiss, which was first presented but the Court withheld its ruling on same, stating that such Motion to Dismiss would be determined with the other issues of the case. Thereupon the cause proceeded to trial on the preliminary injunction on complainant's Bill of Complaint, respondents' Original Answer, and proofs consisting of numerous affidavits of various persons, offered by the respective parties; at the close of the offering proofs, the Court announced that the matter of granting the preliminary injunction would be taken
46 under advisement, and that the restraining order theretofore issued in the cause would be extended until the matter of the granting of the preliminary injunction was determined;

On the 30th day of April, A. D. 1936, pursuant to an agreed setting this cause came on to be heard on its merits and for permanent injunction, and all parties appeared, either in person or by their respective attorneys of record, and, leave of the Court having been duly had, respondents filed their First Amended Answer; all parties then announced ready for trial, respondents' announcement being subject to their Motion to Dismiss, which was first presented but the Court again withheld its ruling on same, stating that such Motion to Dismiss would be determined with the other issues of the case, and it was agreed that the proofs offered in evidence on January 25, 1936, on the hearing on preliminary injunction, would be considered as in evidence on the trial on the merits; the

respective parties then offered their respective additional proofs at the close of which the Court heard the oral argument of counsel for the respective parties; which argument being concluded, the Court announced that the matter would be taken under advisement. Now upon consideration of all the above recited proceedings, it is this the 16th day of July, A. D. 1936, ordered, adjudged and decreed as follows, namely;

That the respondents' Motion to Dismiss Complainant's Bill of Complaint be, and the same hereby is, denied, to which ruling of the Court, respondents then and there excepted;

That the temporary restraining order entered in this cause on the 17th day of January, A. D. 1936, be, and the same hereby is, made permanent and perpetual against the respondents and each and all of them;

47 That respondents and each and all of them, together with their servants, agents, and representatives are further permanently and perpetually restrained and enjoined as in complainant's bill prayed, and in particular from causing either directly or indirectly or causing in any way the molestation, arrest, or interference with the drivers of complainant's trucks, and from in any manner restraining or interfering with any truck belonging to complainant while engaged in interstate commerce, and from in any way impeding, hindering, or interfering with the complainant's business in the transportation of property in interstate commerce in any manner whatsoever.

It is further ordered, adjudged and decreed, that all costs herein, as taxed by the Clerk of this Court, be taxed against the respondents jointly and severally and by them paid for which execution may issue in favor of the officers of this Court, to all of which rulings of the Court, respondents, each and all severally excepted.

It is further ordered that the said decree, except as herein amended, be, and the same hereby is, in full force and effect, this amendment to relate back to the date of the original decree.

Dated this the 13 day of October, A. D. 1936.

JAMES C. WILSON,
United States District Judge.

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48 PETITION FOR APPEAL.

Filed October 13, 1936.

(Title Omitted.)

Now come Ernest O. Thompson, C. V. Terrell, and Lon A. Smith, each individually, the Railroad Commission of Texas, Walton D. Hood, W. B. Renfro, and Tom Miller, respondents in the above entitled and numbered cause, and each feeling himself aggrieved by the final decree made and entered in this cause on July 16th, 1936, as amended by order made and entered on October 13, A. D. 1936, granting to complainant a permanent injunction against respondents, hereby pray that an appeal be allowed to them from said decree to the United States Circuit Court of Appeals for the Fifth Circuit, and in connection with this petition, petitioners herewith attach and present their assignment of errors.

These respondents each pray that his appeal be allowed, that a citation be issued in accordance with law, and that an authenticated transcript of the record, proceedings and papers on the trial, and on which said decree was based, be forwarded to the United States Circuit Court of Appeals for the Fifth Circuit setting at New Orleans, Louisiana.

49 Your petitioners further pray that an order be made fixing the amount of security to be given by them, conditioned as provided by law, in order to prosecute this appeal.

WILLIAM McCRAW,
Attorney General of Texas,
CURTIS E. HILL,
Assistant Attorney General,
Attorneys for Respondents.

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50 ASSIGNMENT OF ERRORS.

Filed Oct. 13, 1936.

(Title Omitted.)

On appeal from the final decree herein entered on July 16th, A. D. 1936, as amended by order made and entered on October 13, A. D. 1936, granting the complainant a permanent injunction against the respondents, Ernest O. Thompson, C. V. Terrell, and Lon A. Smith, each individually, the Railroad Commission of Texas, Walton D. Hood, W. B. Renfro, and Tom Miller, said respondents, and each of them, say that said final decree is erroneous and unjust to said respondents, and each of them, and assign and file the following Assignment of Errors upon which they will rely on appeal to the United States Circuit Court of Appeals for the Fifth Circuit for the reversal of said decree:

1. The Court erred in denying respondents' Motion to Dismiss Complainant's Bill of Complaint.

2. The Court erred in entering the final decree against respondents upon the pleadings.

3. The Court erred in entering the final decree in favor of complainant on the facts found from the pleadings.

51 4. The Court erred in refusing to admit in evidence in toto the affidavit of George A. Knapp, relating to the physical conditions of the various highways of the Designated State Highway System of the State of Texas and the ability of such highways to withstand traffic burdens moving thereover, having admitted only that portion of such affidavit which related to the physical conditions of the particular highways over which complainant sought to operate his motor vehicles in his interstate common carrier motor carrier transportation operation for compensation and hire, and the ability of such particular highways to withstand traffic burden moving thereover, such affidavit reading as follows, to-wit:

52 State of Texas,
County of Harris:

Before me, the undersigned authority, on this day personally appeared George A. Knapp, who by me being duly sworn, did on his oath depose and say:

My name is George A. Knapp, and my residence is at Houston, Texas. I am now and have been continuously during the past thirteen years, engaged by the Southern Pacific Lines in Texas and Louisiana as special engineer on original research work. I was graduated from the Baltimore Polytechnic Institute in 1899 and have practiced Civil Engineering continuously since then both in the United States and abroad. About one half of this period has been devoted to railroad engineering work, including reconnaissance, preliminary and location surveys, construction, maintenance and valuation, the other half being divided between a general engineering practice which included the design and construction of highway, drainage, irrigation

and structural works. As Lieutenant-Colonel of Engineers for approximately 2½ years, I commanded the 315th Regiment of Engineers of the 90th Division during its participation in the World War.

For practically the entire period from December, 1930, until the present time I have been engaged in a study of the various branches of highway engineering, the design, construction and maintenance of pavements and bridges with special reference to their adequacy in carrying various types of motor vehicles from the heavier trucks to the lighter passenger automobiles. My studies were based, primarily upon the design of the highways and bridges of the state of Texas as shown by the records of the State Highway Department, and upon their adequacy, for the traffic moving over them, which was ascertained by me in personal inspection frequently made during this entire period. These studies were amplified to include cognizance of the experiments and investigations pertaining to similar questions as conducted by the United States Bureau of Public Roads and other official agencies.

As at present constituted, the highway system of Texas comprises a total length of approximately 190,000 miles which includes the state designated
53 highways having a mileage of 21,046, being approximately 11 percent of the total. The state designated highway system as composed includes a substantially large mileage of roads which in 1917 when the Texas State Highway Commission was created, were carved out of the county roads as they then existed. Highway requirements, considering the size and weight of the vehicles using the highways at that time, were adapted only to light automobiles, an occasional light truck and horse drawn vehicles. The best evidence of this fact is that the highway bridges were designed almost uniformly at that time

for a safe load of 5 tons. While these inferior highways inherited by the State Highway Department from the counties, have in most instances been materially improved and in many cases completely replaced by pavements of modern design, nevertheless, there are considerable lengths of the old roads which still remain and which occur at intervals throughout the present state system. These pavements may be identified by their non rigid types of constructions, their widths being invariably 18 feet or less, their sharp curves, steep grades, high crowns, irregular surfaces, eroded edges which may or may not have been patched, narrow earth shoulders, and lightly constructed bridges. The highways with which this affidavit is concerned are identified in detail in Exibits 1 and 1-A, hereto attached, and include substantial lengths of those old road types scattered throughout their length.

In November, 1932, I first completed a study of certain of the official records of the maintenance section of the Texas State Highway Department at Austin, Texas, which studies have been revised from time to time in accordance with the changed condition and description of the highways concerned,—the latest revision being as of April, 1936. These studies took cognizance of the identity, mileage and width of each of the forty distinct types of pavement and surface of the state designated highway system. These recorded data are checked by frequent personal field inspections, noting details of wear and traffic conditions. The purpose of the study was the segregation of the types so identified into five groups, the types composing each group having similar characteristics of design and load carrying capacity, these groups being (1) Earth Surface; (2) Gravel, Shell, Calliche, Iron Ore soil surfaces, etc., without bituminous or waterproof topping, (3) Bituminous topping on Gravel, Calliche, Macadam, etc.; (4) Asphalt topping on gravel Calliche, Macadam, etc.; (5) Concrete pavements, also

the further separation of these five groups into two principal classifications identified and referred to herein as "Rigid Types," being all of those constructed of concrete in some form, and "Non-rigid Types," being all forms of road pavement or surface
54 other than concrete.

Reference is made in this connection, to Exhibits 1 and 1-A attached hereto and made a part hereof.

Exhibit 1 is a description of highway types in the entire state designated highway system of Texas considered under the groups and classifications discussed above.

Exhibit 1-A is a description of highway types in the routes designated in the application filed by A. E. McDonald with the Texas Railroad Commission, the highway types being grouped and classified as in Exhibit 1.

The summary on the last page of each of Exhibits 1 and 1-A shows that the total highway mileage represented by each Exhibit is divided into the general groups identified above as follows:

	Exhibit 1.	Exhibit 1-A.
Earth surface (both improved and unimproved)	26%	3%
Gravel, iron ore soil, caliche surface, etc.	6%	2%
Bituminous topping on gravel, macadam, etc.	34%	23%
Asphalt topping on gravel, macadam, etc.	10%	14%
Concrete pavement	21%	52%
Distance through cities	3%	6%
Total	100%	100%

These groups are further classified as between Rigid Types and Non-Rigid Types as follows:

	Exhibit 1.	Exhibit 1-A.
Rigid Types (Concrete)	21%	52%
Non-Rigid Types (All other than concrete)	76%	42%
Distance through cities	3%	6%
Total	100%	100%

Attention is directed to the fact that the percentage of Non-Rigid Types in the total state designated highway mileage covered by Exhibit 1 is greatly larger than that of the rigid types and, in the case of the highways covered by the McDonald Application, Exhibit 1-A, is almost as large, thus identifying a basis of highway inadequacy as discussed below:

Exhibits 2, 2-A, 3 and 3-A attached hereto and made a part hereof are described as follows:

Exhibit 2 shows the width of Non-Rigid pavements, excepting earth in the entire state designated
55 highway system of Texas. The exhibit shows a total length of non-rigid pavements, excepting earth, of 10,618 miles, 23 percent of which are 16 feet wide or less; 41 percent from 16 to 18 feet wide, or a total of 64 percent which are 18 feet wide or less.

Exhibit 2-A shows the width of the non-rigid pavements, excepting earth in the highway routes specified in the application filed by A. E. McDonald with the Texas Railroad Commission, the total length of which non-rigid pavements is 487.1 miles of which 15 percent are 16 feet or less, 60 percent are from 16 to 18 feet wide and a total of 75 percent are 18 feet wide or less.

Exhibit 3 shows the width of rigid or concrete pavements of the state designated highway system, the total length of which rigid pavements is 4,437 miles of which 4 percent are 16 feet or less, 63 percent are from 16 to 18 feet in width, or a total of 67 percent which are 18 feet wide or less.

Exhibit 3-A shows the width of rigid pavements in routes specified in the application filed by A. E. McDonald, the total length of which rigid pavements is 607.5 miles of which 9 percent are 16 feet or less, 28 percent are from 16 to 18 feet wide, or a total of 37 percent which are 18 feet wide or less.

The large proportions of the total of both rigid and non-rigid pavements, which are shown in these Exhibits to be 18 feet wide or less, identifies their inadequacy for the use of vehicles having a width in excess of 7 feet when consideration is given to the following:

The usual width of private passenger automobile is 6 feet or less. A minimum width of two lane pavement for the use of such vehicles may not be reasonably less than 16 feet. It is then obvious, in order to secure the same degree of mobility, clearance, and safety, that for vehicles 7 feet wide, the pavement would have to be 18 feet wide and for the same reason, vehicles 8 feet wide would require a pavement width of 20 feet. Numerous measurements of the heavy commercial trucks made by me, show that this class of vehicle almost invariably measures the full width of 8 feet permitted by Texas law. These pavements of inadequate width for the use of the wider vehicles occur at frequent intervals throughout the length of practically all highways of the state including those in the routes specified in the application of A. E. McDonald.

Considerations of pavement type and width, as affecting the adequacy of the pavements to sustain the heavier loads imposed by commercial trucks and, as affecting the safe use of the highways by the public, are discussed in the following:

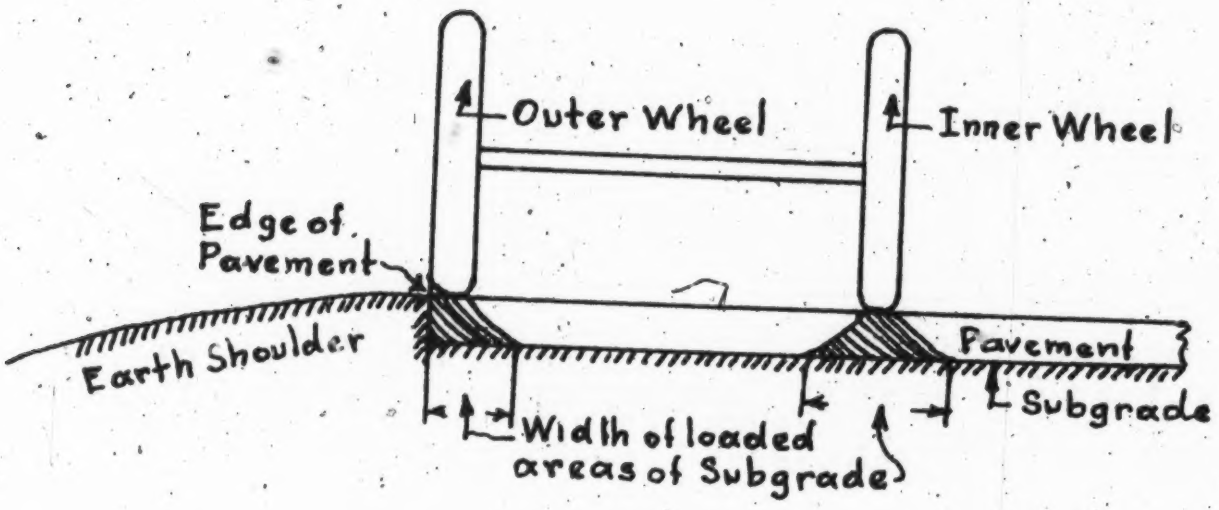
(1) The rigid or concreted types of pavements, as now designed are possessed of great strength
56 or rigidity, which quality permits of the loads passing over the road to be distributed over large areas of the subgrade, (the earth upon which the pavement rests), thereby imposing low unit loading (per square inch) upon the subgrade.

(2) All non-rigid types of pavement lack in a large degree the quality of rigidity as may be demonstrated by the fact that a slab of any non rigid type pavement if suspended by supports placed at each end, will break of its own weight. Hence, the adequacy of all non-rigid type pavements to carry the loads imposed by traffic upon them depend almost entirely upon the load sustaining ability of the subgrade.

(3) Approximately 75 to 80 percent of the soils forming the subgrades supporting pavements in the eastern one third of the State of Texas, and a very considerable proportion of the middle one third, are classified as clay, gumbo or silt which soils have the quality of absorbing water rapidly which fact, in varying large degree, destroys their load carrying ability. This circumstance, taken together with the greatly heavier rainfall of the eastern third of the state renders the subgrades composed of such soils practically unfit for use with the non-rigid type pavements, except for light weight vehicles.

(4) The adequate width of a non-rigid type pavement is an absolutely essential consideration entering into its ability to support the loads imposed by the heavier traffic is best demonstrated by showing the manner whereby the wheel load concentrated on the surface of the non-rigid pavement is transmitted through the pavement to the subgrade by a truncated cone of forces with the base of the cone resting upon the subgrade.

The following sketch illustrates this action:


Outer Wheel
Inner Wheel
Edge of Pavement
Earth Shoulder
Pavement
Subgrade
Width of loaded areas of Subgrade

57 There the pavement is of such narrow width as to render necessary the use of its edges by passing vehicles as shown in the sketch, it is apparent that the load of the inner wheel is distributed to the subgrade over an area almost twice as great as is the case of the outer wheel resting upon the edge of the pavement. In other words, the subgrade at the edge of the pavement carries almost twice the load per square inch of area as that under the inner wheel.

Narrow widths of pavements as identified in Exhibits 2, 2-A, 3 and 3-A, cause frequent use of the earth shoulders adjoining by passing vehicles, which, during periods of prolonged wet weather causes the shoulders to become deeply rutted, thus impounding water at the edge of the pavement which water is rapidly absorbed by clay, gumbo and silt soils forming the subgrade under the edge of the pavement. It is therefore apparent that under these conditions, the subgrade under the non-rigid pavement is subjected to its maximum load at a point where the subgrade is least able to sustain it. The result is eroded and sunken shoulders of the pavement with corresponding high crowns along the center, the surface being pushed into wavelike irregularities. These conditions represent the direct result of an overloaded subgrade caused by trucks, the maximum wheel load of which, under Texas laws, is approximately five times greater than that of a heavy private passenger automobile. Once begun these conditions rapidly become worse,—the eroded shoulders further narrowing an already inadequate width of pavement, their sunken condition furnishing a continuous basis for holding water, the high crown further increasing the load upon the outer wheel by excessively tilting the vehicle, and the impacts of heavy loads being increased by the surface irregularity.

(5) The thickness of non-rigid types of pavement as constructed in Texas varies greatly,—the tendency

during the last three or four years being toward considerably thicker pavement than prior to this time. The present standard base varies from 7 to 10 inches of compacted thickness, depending upon the nature of the subgrade. Most of the mileage of the non-rigid type bases are considerably under this, and thicknesses of as little as 2 inches are found on the older roads. The topping for bituminous treated pavement varies from 3/8 to 3/4 of an inch in thickness, while that of the asphalt topping varies from 1 to 2 inches in thickness. The primary purpose served by the topping is to render the pavement impervious to water in order that the subgrade may be kept dry, thereby increasing its load sustaining power, and secondarily, to prevent raveling of the pavement during times of dry
58 weather with its resulting loss of paving material. The following may be stated to be the approximate thickness of the various types of pavement as classified in the exhibits hereto attached:

Type of Pavement.	Total Thickness Incl. Topping (Compacted)
Gravel, shell, caliche, etc.	Average, 6 inches.
Older roads, gravel, shell, caliche, etc., with bituminous topping	Average, 7 inches.
Newer roads, gravel, shell, caliche, etc., with bituminous topping	Average, 8 inches.
Older roads, gravel, macadam, etc., with asphalt topping ...	Average, 8 inches.
Newer roads, gravel, macadam, etc., with asphalt topping ...	Average, 9½ inches.

The inadequacy of these thicknesses to support heavy truck loads becomes apparent when compared with the required thicknesses of concrete under similar loading conditions.

Numerous experiments have been conducted by the Bureau of Public Roads of the U. S. Department of Agriculture showing the inter-relationship of the load, road and subgrade. The results of one of these experiments were reported in "Public Roads," a journal of highway research published by the Bureau of Public Roads, being Vol. 10, No. 3, dated May, 1929, which on page 37 thereof sets forth the following: 'For the purpose of this discussion road surfaces are divided into those which offer very little or no resistance against bending (flexible or non-rigid types, including macadam), and those which have appreciable 'beam' strength (concrete roads, etc.)

Both field and laboratory observations demonstrate that new water bound macadams, as compared with rigid types, afford relatively small load distribution—The curves resulting from tests at the Arlington Experiment Station show that a load placed directly on a concrete slab (8 ft. square) exerts a unit pressure on a clay subgrade equal to but one-eighth of that exerted by the same load when placed directly on a crushed stone layer of equal area and thickness. The same experiments indicate that a load placed on a concrete slab four inches thick exerts a unit pressure upon a clay base equal to that exerted by the same load when placed on a crushed stone layer 42 inches thick.'

59 In other words,—with a given wheel load, it would be necessary to have a crushed stone layer 42 inches thick to secure the same unit loading on the subgrade as would be the case under 4 inch concrete slab.

It is significant that the nature of the subgrade used in this experiment, being clay, is similar to that referred to above as existing in a larger part of Texas. Concrete pavement design for thickness required to support any

particular load is based upon definite principles which are expressed in the 'Agg' formula recognized by all highway authorities. The net load limit of 7,000 lbs. as prescribed by Texas laws, if carried in an adequate vehicle, would approximate a gross load vehicle and load of 14,000 lbs. which, under maximum loading conditions, assumed by the Texas State Highway Department of 80 per cent on the rear axle of a truck, would produce an axle load of 11,200 lbs. and a wheel load of 5,600 lbs. Likewise, this wheel load of a truck tractor weighing 3,500 pounds and of a semi trailer weighing 4,000 pounds, carrying a net load of 7,000 pounds under maximum conditions of loading, will be approximately 5,200 or about 7 percent less. The required shoulder thickness of concrete pavement to support the wheel load of 5,200 pounds would be 7¼ inches, which is almost double the 4 inch thickness of concrete cited in the experiment noted above. Considering that the thickness of the older non-rigid pavements is not more than 7 to 8 inches, these experiments prove conclusively that the flexible types of highways, especially during times of prolonged wet weather, are inadequate to carry the maximum loads prescribed by the Texas laws. Frequent highway inspections made by me during periods of wet weather, have demonstrated the conclusions reached by the experiments to have been correct.

I have made a partial survey of the bridges located upon the highways shown in Exhibits 1 and 1-A. The purpose of this survey was to identify those bridges which were built by the counties prior to the acquisition by the State Highway Department of the highways upon which these bridges are located, and which bridges are shown by actual measurements and computations made by me to have a safe loading capacity less than that required for the maximum net loads of 7,000 pounds allowed under the present laws of the state which, including the weight of an adequate vehicle totals approximately 14,000 pounds or 7 tons.

Exhibits 4 and 4-A, attached hereto and made a part hereof are described as follows:

Exhibit 4 identifies a total of 317 highway bridges having a safe loading capacity of less than 7 tons which are located upon state designated highways of Texas as identified in Exhibit 1.

60 Exhibit 4-A identifies a total of 27 highway bridges having a safe loading capacity of less than 7 tons which are located upon highways specified in application of A. E. McDonald filed with the Texas Railroad Commission.

This survey was made in connection with my highway inspections, but has been revised as of April 17, 1936, all such bridges which have been renewed or materially strengthened having been excluded from Exhibits 4 and 4-A.

The Exhibit shows:

The survey number.

The location of the bridge with reference to the adjoining towns.

The name of the stream crossing.

Whether a one or a two way bridge.

The safe loading capacity in tons in terms of their condition when new.

The present physical condition of the bridge as qualified by good, fair or poor.

The safe loading capacity shown herein is computed by identical methods and formula used by the Bridge

Design Section of the Texas State Highway Department, i. e., by computing the load required to break through the bridge and then dividing this by a factor of safety of 4. The purpose of the factor of safety, which is common to all proper structural design, is to take care of the physical depreciation incidental to the effect of the elements and use, as also imperfections in material and workmanship which are not apparent. Loads in excess of the safe loading capacity as computed for its condition when new, especially considering a minimum age of sixteen years for all of these bridges most of which embody wood construction in some form, must necessarily decrease the factor of safety built into them, which fact invites the collapse of the structure. Such failure, in the case of a two way bridge, may involve other users than the offender. Numerous instances of the collapse of such bridges due to excessive loads are shown in the records of the State Highway Department and their continued abuse from such overloads is certain, sooner or later to have similar results. The inadequacy of these bridges may be judged by the fact that the present standard requirement of highway bridge design in Texas, using identical methods of computation, is a safe loading capacity of fifteen tons.

A very large proportion of the bridges shown in Exhibits 4 and 4-A are incapable of carrying two-way traffic and are placarded by the State Highway Department as a 'One Way Bridge,' having a width of less than 16 feet. Other included in this list
61 and many not included but also located along the highway specifically referred to herein, have a width between 16 and 18 feet and are placarded by the State Highway Department as 'Narrow Bridge.' Situated as they are at the bottom of hills which renders vehicular control more than ordinarily difficult, their use by trucks much wider and longer than are the passenger cars, renders apparent the

additional hazard arising out of any increase in truck traffic.

Attached hereto and made a part hereof is Exhibit 5, which is described as being a comparison of truck density in Texas with that in the United States for the years 1915 to 1935 inclusive. Truck density as used herein, is defined as the ratio of the number of trucks to the total number of motor vehicles registered. The ratio of truck density of Texas to that of the United States is designated in the exhibit as the "Comparative Truck Density," being shown in the last column thereof. The exhibit shows that the truck density of Texas was 22 percent of that of the average of the United States in 1915 and gradually, year by year, increased, until, in 1929, it passed that of the United States, and in 1935 had risen to 126 percent thereof.

Exhibit 6, attached hereto and made a part hereof, sets forth the Texas motor vehicle registrations by classes of vehicles for the years 1917 to 1935 inclusive, the date being taken from the biennial report of the Texas State Highway Department. Also shown on the lower half of the Exhibit is a statement which indicates the comparative growths of passenger car and truck traffic in Texas from the year 1925 to 1935 inclusive. Considering the passenger car registrations for 1925 as 100 percent, it will be noted that peak registration was reached in 1930 at which time registrations were 136 percent of the 1925 figures; also, while the year 1935 showed some recovery from the slump which occurred during the years between that passenger car registrations for 1935, which were 125 percent of the 1925 registrations, had not regained the losses since the peak in 1929.

Truck registrations, on the other hand, are shown by the exhibit to have increased annually each year

between 1925 and 1935, at a much greater rate than was shown by passenger cars, registrations for 1935 being 280 percent of those 1925. It will also be noted that decreased truck registrations for 1932 and 1933 were comparatively slight and that 1935 registrations were substantially greater than those shown in the previous peak in 1931.

Exhibit 7, attached hereto and made a part hereof, shows the growth of Common Contract and Special Commodity Carrier operations in Texas from 1932 to 1935 inclusive, being predicated upon data contained in the annual reports of the Motor Transport
62 Division of the Texas Railroad Commission, certified copies of which reports are hereto attached. It will be noted that similar data prior to 1932 are not obtainable due to a change in Texas law in that year. The exhibit will show that, based upon the total number of trucks authorized by the Texas Railroad Commission to be operated and the average annual truck mileage of vehicles actually operated, the potential truck mileage percent increased from 100 percent in 1932 to 156 percent in 1935. This large increase is partly accounted for by the increase in the number of carrier-for-hire trucks authorized being 3,075 in 1932 and 3,404 in 1935. It is principally accounted for, however, by the large increase in the average annual truck mileage run, per truck operated, being 22,001 miles in 1932 and 31,067 miles in 1935.

Summing up, Exhibit 5, 6, and 7 show respectively:

That truck density in Texas increased each successive year, except one, from 1915 when Texas truck density was 22% of that of the average of the United States, to 126% in 1935.

That, while passenger car registrations in Texas increased 25 percent between 1925 and 1935, Texas truck registrations increased 180 percent.

That truck miles of Common, Contract, and Special Commodity Carrier operations authorized by the Texas Railroad Commission increased 56 percent in the four years 1932 to 1935 inclusive.

Attached hereto and made a part hereof is Exhibit 8 which sets forth the population and motor vehicle registrations in the counties traversed by the identical highways shown in Exhibit 1-A, being those highways specified in the application of A. E. McDonald filed with the Texas Railroad Commission, as also a comparison of the population and motor vehicle registrations of such counties with similar data for the entire state of Texas. The summary of Exhibit 8 shows that while the counties along the routes applies for number only 13 percent of the total counties of the entire state, the population of such counties amounts to 38 percent and the motor vehicle registrations 41 per cent of the entire state. This study is not intended to show actual traffic over the highways, but rather the fact that these highways traverse a densely populated portion of the state, being approximately 3 times the average of the entire state, while the density of motor vehicle registrations is even greater. All of the traffic represented by these motor vehicle registrations is potential to the highways in their respective counties which are sought to be traversed by the applicant. Because of the fact that congestion on any highway may not be considered from the view point of average use, but
63 rather maximum, or peak use, the facts of such greatly heavier density of population and motor vehicle registrations become significant in this case. It is to be noted that potential traffic from adjoining counties and from outside the State, all of which forms a substantial part of the actual traffic along these routes, has been omitted from the study.

All of the foregoing is offered as evidence identifying inadequacies in the highway and bridges of the

state designated highway system to sustain heavy truck traffic without creating conditions which will unreasonably interfere with the public use of such highways and bridges.

GEO. A. KNAPP.

Sworn and subscribed to before me this 29 day of April, A. D. 1936.

J. ARTHUR MILLER,
Notary Public in and for
Harris County, Texas.

EXHIBIT No. 1.

Docket No. 864. Witness: Knapp.

Description of Highway Types in State Designated Highway System of Texas.

As Verified by Personal Inspection of Geo. A. Knapp on the Ground.

From	To	Hwy. No.	Total Miles All Types	Earth Surf.	Type of Gravel, Etc.	Highway Surface—Miles Bitu. Top	Asph. Top	Concrete	Thru Cities
N. Mex Line	Texarkana	1	859.9	62.4	3.0	321.1	187.0	226.6	49.8
Abilene	Jct. #15	1A	25.2	...	...	...	...	25.2	...
Jct. #1	Dallas	1B	4.8	...	0.2	...	...	3.3	1.3
Ringgold	Laredo	2	511.3	19.9	35.7	122.2	158.2	140.5	34.8
Burleson	Itasca	2A	37.8	...	...	35.9	...	...	1.9
Van Horn	Sabine R.	3	790.6	102.0	3.9	301.1	175.6	179.4	28.6
Seguin	Waelder	3A	46.9	...	...	...	...	44.9	2.0
Okla. Line	Boca Chica	4	835.6	329.4	15.5	111.0	97.0	264.0	18.7
New Mex. Line	Texarkana	5	636.2	136.4	41.1	99.5	18.4	306.5	34.3
Red R. Br.	Galveston	6	379.8	11.5	...	90.3	21.7	219.1	37.2
New Mex. Line	Joaquin	7	549.9	150.3	15.0	281.8	...	86.4	16.4
Ark. Line	Pt. Arthur	8	302.5	56.9	10.4	141.9	37.2	44.6	11.5
Stratford	Corpus Christi	9	637.7	169.3	21.7	301.1	43.4	84.8	17.4
Ft. Stockton	Whitesboro	10	382.5	57.8	45.8	217.2	7.4	44.0	10.3

Commerce	Okla. Line	11	127.5	6.0	11.4	88.6	17.3	...	4.2
Laredo	Rosenberg	12	298.8	...	1.4	1.3	111.7	180.5	3.9
N. M. Line	Amarillo	13	72.6	53.0	...	12.0	4.7	...	2.9
Gunter	Bremond	14	175.7	6.8	13.0	34.7	33.8	73.4	14.0
N. M. Line	La Line	15	456.0	185.5	...	97.6	88.4	71.0	13.5
Okla. Line	Falfurrias	16	372.6	54.3	...	59.9	207.2	41.3	9.9
Pecos	Rio Grande R.	17	149.2	134.2	...	14.2	...	...	0.8
Estelline	Jct. Hy. #15	18	200.1	93.5	7.0	74.2	...	24.4	1.0
Jct. Hy. #15	Freeport	19	285.6	41.9	20.6	54.2	...	157.2	11.7
Nr. Segovia	Hempstead	20	247.6	50.1	17.5	128.1	7.9	38.4	5.6
Lincoln	Sabine R.	21	235.1	47.2	81.1	18.5	...	84.3	4.0
Hamilton	Timpson	22	248.5	130.1	47.0	47.2	...	20.5	3.7
Okla. Line	Brady	23	250.2	52.6	6.7	153.3	13.5	19.8	4.3
N. M. State Line.	Red River	24	529.6	128.9	26.4	205.5	63.9	90.7	14.2
Okla. State Line.	Windthorst	25	38.5	11.1	...	21.6	...	4.1	1.7
Longview	Nr. Nacogdoches	26	65.2	11.5	...	52.1	...	...	1.6
N. M. State Line.	Pt. O'Connor	27	570.3	145.4	37.7	267.0	77.6	36.7	5.9
Mule Shoe	Okla. Line	28	223.3	73.7	...	58.4	...	86.4	4.8
Nr. Rock Sprgs.	Goliad	29	311.1	191.3	...	109.5	5.2	1.1	4.0
Okla. Line	Del Rio	30	333.6	43.2	18.5	86.1	20.1	156.3	9.4
Waco	Gladewater	31	160.3	15.8	...	54.0	2.1	83.8	4.6
Richland	Huntsville	32	107.0	...	...	...	...	106.5	0.5
El Paso	Okla. Line	33	232.9	61.5	...	38.5	18.5	104.1	10.3

From	To	Hwy. No.	Total Miles All Types	Type of Highway Surface—Miles					
				Earth Surf.	Gravel, Etc.	Bitul. Top	Asph. Top	Concrete	Thru Cities
Jct. Hy. #66	Honey Grove	34	223.3	21.8	17.2	114.3	12.4	45.8	11.8
La. Line	Gregory	35	408.2	16.8	43.5	134.6	0.4	198.4	14.5
Commanche	Freeport	36	263.2	80.2	32.7	44.1	...	100.8	5.4
Clarksville	Jacksonville	37	130.5	33.2	...	88.2	.2	5.3	3.6
Sugarland	Jct. Hwy. #6	38	47.9	27.5	...	...	...	20.4	...
Okla. Line	Nr. Beaumont	40	339.1	50.3	...	207.7	6.6	64.5	10.0
Carter Valley	Mt. Home	41	107.8	30.4	38.3	39.1	...	...	...
Whitewright	Jct. Hy. #15	42	88.5	...	29.0	36.0	19.1	1.8	2.6
Round Rock	Karnack	43	263.7	17.4	0.2	160.4	...	77.5	8.2
Waco	La Grange	44	125.1	43.3	11.6	54.2	2.4	10.8	2.8
Roans Prairie	Newton - Jasper Co. L.	45	117.5	65.1	5.8	23.3	...	23.3	...
Jct. Hy. #66	New Braunfels	46	24.1	10.4	5.0	7.2	...	...	1.5
Ark. Line	Jct. Hy. #49	47	67.0	16.9	...	26.0	...	21.6	2.5
Progresso	Pt. Brownsville	48	36.2	...	...	...	2.3	31.7	2.2
Paris to La. Line		49	120.9	23.6	23.4	63.7	0.6	8.1	1.5
Henrietta to Bowie		50	28.6	...	...	6.1	...	21.9	0.6
Meadows	McCamey	51	167.4	10.7	...	156.7	...	...	...
Okla. S/L.	Wellington	52	14.0	14.0	...	...	...	...	...
Lampasas	Jct. Hy. #44	53	76.7	54.6	...	...	...	21.0	1.1
Jct. Hy. 130	Van Horn	54	55.0	55.0	...	...	...	...	...

Rock Springs	Uvalde	55	70.6	20.3	7.4	9.1	33.8	...	...	
N. M. S/L.	Okla. S/L.	56	92.8	91.2	...	...	...	...	1.6	
Nacona	Bowie	59	19.5	9.1	10.4	...	...	...	...	
Wallis	Matagorda	60	63.7	13.7	7.4	9.7	...	31.2	1.7	
Devers	Anahuac	61	21.5	4.7	9.1	7.7	...	...	...	
Buma	Jct. Hy. #3	62	24.9	...	7.8	17.1	...	...	...	
Zavala	Sabine R.	63	67.2	...	37.4	29.8	...	...	...	
Wills Point	La. S/L.	64	137.3	...	1.0	91.1	...	41.7	3.5	
Mt. Pleasant	Gladewater	65	45.5	...	...	37.9	6.1	...	1.5	
Wichita Falls	Rio Grande R.	66	531.6	63.4	93.4	94.5	200.7	66.5	13.1	
Graham	Waco	67	198.3	51.5	14.2	91.5	30.4	7.9	2.8	
Stephenville	Dallas	68	106.1	...	24.9	64.3	12.4	...	4.5	
Cameron	Hearne	69	28.6	...	27.1	...	...	...	6.5	
Jayton	Jct. Hy. #30	70	135.8	47.2	8.2	79.2	...	...	1.2	
Austin	Jct. Hy. #35	71	151.8	15.3	1.5	85.2	...	47.0	2.8	
Jct. Hy. #20	Jct. Hy. #16	72	126.0	2.4	...	43.8	48.0	31.8	...	
Sealy	Eureka	73	45.1	22.1	...	10.7	4.7	7.6	...	
Rochelle	Burnet Co./L.	74	99.7	60.6	26.3	10.0	...	...	2.8	
Goldthwaite	Lometa	74A	21.2	14.3	6.6	...	...	...	0.3	
Tex. Okla. S/L.	Amarillo	75	102.2	13.7	2.8	17.0	...	68.7	...	
Eagle Pass	La Pryor	76	46.1	29.9	...	16.2	...	...	...	
Naples	La. S/L.	77	42.0	11.7	...	30.3	...	...	...	
Okla. Line	Garland	78	85.0	25.3	...	59.0	...	...	0.7	

From	To	Hwy. No.	Total Miles All Types	Type of Highway Surface—Miles: Earth Surf.	Gravel, Etc.	Bitu. Top	Asph. Top	Concrete	Thru Cities
Wichita Falls	Throckmorton	79	69.5	...	...	28.0	...	39.8	1.7
Wimberly	Nixon	80	67.7	28.0	14.0	23.5	...	...	2.2
De. Leon	San Antonio	81	258.5	136.7	78.4	22.7	13.8	...	6.9
New Mex. Line	Sanderson	82	147.1	90.3	...	56.6	0.2	...	...
New Mex. Line	Jct. Hy. #70	84	147.0	120.4	...	24.1	...	...	2.5
Del Rio	Dilley	85	143.8	14.5	19.0	...	109.3	...	1.0
Bovina	Turkey	86	103.7	99.4	...	3.5	...	...	0.8
Milam	High Island	87	181.9	83.4	59.8	28.6	...	5.6	4.5
Tex. Okla. S/L	Clarendon	88	75.1	64.2	...	10.9	...	...	...
Weatherford	Jct. Hwy. #1	89	45.5	45.5	...	...	...	...	...
Madisonville	Brenham	90	68.4	7.4	...	38.2	...	21.2	1.6
Red River	Denison	91	13.1	...	...	...	...	12.1	1.0
Hamlin	Stamford	92	17.8	...	...	17.8	...	...	...
Trinity	Lufkin	94	53.1	0.2	1.6	50.4	...	...	0.9
Temple	Hochheim	95	93.8	...	...	56.1	7.9	26.9	2.9
Corpus Christi	Harlingen	96	45.1	...	...	...	...	42.5	2.6
Jct. Hwy. #27	Nr. Fullerton	97	54.1	26.6	...	22.9	4.6	...	...
Boston	Simms	98	9.5	...	...	9.5	...	...	...
Barreda	Pt. Isabel	100	24.6	...	...	...	...	24.1	0.5
Snyder	Colorado	101	24.9	24.9	...	...	...	...	...
Taylor	Lexington	102	28.5	14.2	...	13.6	...	...	0.7

Crockett	Ratcliff	103	19.5	19.5	...	...	...	...	...	
E. Liberty Hill	Circleville	104	27.1	12.2	...	14.1	...	...	0.8	
Navasota	Cleveland	105	66.5	54.9	11.6	...	...	...	...	
Crockett	Woodville	106	74.1	...	...	73.8	...	...	0.3	
Strawn	Stephenville	108	32.8	27.1	5.1	...	...	...	0.6	
Tyler	Rusk	110	44.3	...	...	44.3	...	...	...	
Edna	Midfield	111	26.3	26.3	...	...	...	...	...	
Gonzales	Karnes City	112	51.9	...	...	4.2	25.2	...	...	
Victoria Co./L.	Austwell	113	15.1	10.7	4.4	...	...	...	...	
Bridgeport	Dallas	114	73.2	22.0	...	2.2	...	49.0	...	
Kermit	Pyote	115	26.9	...	...	8.5	18.4	...	...	
Okla. State L.	Claude	117	156.1	43.8	...	72.7	14.5	20.9	4.2	
Ft. Davis	Alpine	118	24.0	15.2	...	7.8	...	...	1.0	
Yorktown	Goliad	119	15.3	...	...	15.3	...	...	...	
Old Glory	New Castle	120	86.7	66.9	...	18.5	...	...	1.3	
Birdville	Jct. Hwy. #40	121	19.5	...	1.3	...	0.3	17.9	...	
Parsons Switch	Cleburne	122	26.9	9.0	17.9	...	...	...	...	
San Marcos	Stockdale	123	45.3	...	...	20.7	...	22.3	2.2	
Stowell	Galveston	124	48.4	3.5	10.0	33.4	...	...	1.5	
Jct. Hwy. #61	Beaumont	125	44.9	...	30.6	8.4	...	5.0	0.9	
Con Can	Sabinal	127	21.0	...	...	...	21.0	...	...	
Victoria	Alice	128	109.6	...	...	...	49.4	60.2	...	
El Paso	N. M. S/L.	130	128.7	29.8	...	96.6	...	1.0	1.3	

From	To	Hwy. No.	Total Miles All Types	Surface—Miles: Earth Surf.	Type of Gravel, Etc.	Highway Bitu. Top	Asph. Top	Concrete	Thru Cities
Brackettville	Spofford	131	9.2	...	...	...	9.2	...	...
S. J. Bat. Grnd.	LaPorte Rd.	134	8.8	...	4.4	...	...	4.4	...
Jct. Hwy. #31	Troup	135	33.5	...	...	33.5	...	...	...
Carson Co./L.	Amarillo	136	30.4	5.8	...	24.6	...	...	...
Lubbock	Meadows	137	24.9	...	...	24.9	...	...	...
Tex. Okla. S/L.	Jct. Hwy. #4	138	11.1	11.1	...	...	...	...	...
Chilton	Marlin	139	11.4	...	10.8	...	...	...	...
Jct. Hwy. #66	Kingsville	141	14.5	...	...	...	...	13.9	0.6
Glen Rose	Meridian	144	23.4	6.3	6.1	11.0	...	...	...
E. McKinney	Princeton	145	1.2	...	...	1.2	...	...	...
Polk-Liberty Co. L.	Tex. City Jct.	146	112.7	67.1	6.8	30.1	...	8.7	...
San Augustine	Zavalla	147	36.5	30.2	6.3	...	...	...	...
Red River Br.	Henrietta	148	28.5	10.4	17.5	...	...	...	0.6
Longview	Carthage	149	41.7	10.7	11.7	19.3	...	...	...
New Waverly	Shepherd	150	34.0	...	7.7	26.0	...	0.3	...
Menard	Mason	151	39.6	39.6	...	...	...	...	...
Pompa	Wheeler	152	35.1	11.8	...	16.9	6.4	...	...
Cooper	Quitman	154	45.8	33.3	...	11.6	...	...	0.9
Gilmer	Marshall	155	39.2	28.6	...	9.6	—	...	1.0
Point Blank	Cold Springs	156	13.5	...	...	13.5	...	...	...

Jct. Hwy. #23	Breckenridge	157	31.2	...	...	...	30.5	...	0.7	
Robert Lee	S. of Abilene	158	50.5	39.8	...	...	10.7	...	...	
Oldenburg	Hempstead	159	50.6	...	...	35.2	...	15.4	...	
Denison	Jct. Hwy. #78	160	29.3	12.5	...	1.8	...	14.7	0.3	
Fannin	Fannin Park	162	0.7	0.7	...	...	...	...	...	
Barnhart	Ozona	163	29.5	...	...	29.5	...	...	...	
Mart	Limestone C/L.	164	11.0	...	...	2.1	...	7.7	1.2	
Austin Cemetery	Driveways	165	0.9	...	...	0.9	...	...	...	
Ft. Davis	McDonald Observ.	166	17.3	17.3	...	...	...	...	...	
Tomb Miers Expd.	La Grange	167	1.0	...	...	1.0	...	...	...	
S. of Canadian	Jct. Hy. #4 & 33	170	2.7	...	...	2.7	...	...	...	
Hillsboro	Hubbard	171	27.8	...	26.7	...	...	...	1.1	
Ganado	Olivia	172	28.2	28.2	...	...	...	...	...	
Walnut Spgs.	Cleburne	174	43.6	9.7	17.5	16.1	...	...	0.3	
Tyler	Kilgore	176	25.3	...	...	25.3	...	...	...	
Blessing	Wye	177	0.8	...	...	...	...	0.8	...	
Hartley	Moore Co./L.	178	13.3	...	...	13.3	...	...	...	
Teague	Dew	179	8.4	8.4	...	...	...	...	...	
Jct. Hwy. #5	Annona	180	3.1	...	...	3.1	...	...	...	
Gary	Jct. Hwy. #8	181	5.1	...	...	5.1	...	...	...	
Alba	Quitman	182	10.6	10.6	...	...	...	...	...	

From Surf. Etc.	To Top Top	Hwy. No. Concrete	Miles All Types Cities	Earth Surf.	Type of Gravel, Etc.	Highway Bitu. Top	Surface—Miles Asph. Top	Concrete	Thru Cities
Dallas	Mesquite	183	11.2	...	...	2.2	8.3	0.7	...
Bronson	Hemphill	184	11.1	...	...	11.1	...	...	...
Green Lake	Seadrift	185	7.5	...	7.5	...	...	...	...
Willacy-Hidalgo Co./L.	N. of Raymondville	186	5.8	5.8	...	...	...	...	...
Cisco	Jct. Hwy. #67	187	8.7	...	...	8.7	...	...	...
Bastrop Co./L.	Jct. Hwy. #71	O. S. R.	91.7	38.0	...	53.7	...	...	...
Brookston	Roxton	188	5.5	...	...	5.5	...	...	...
Albany	Coleman	191	16.4	16.4	...	...	...	...	...
Mingus	Gordon	193	6.5	...	6.5	...	...	...	...
Dimmitt	Plainview	194	29.0	22.3	...	4.4	...	...	2.3
Jct. Hwy. #74	Georgetown	195	23.1	8.6	...	14.5	...	...	...
Kent	Ft. Stockton	196	76.3	...	...	76.3	...	...	...
Canton	Mabank	198	20.6	2.4	...	18.2	...	...	...
Olney	Jacksboro	199	31.7	31.7	...	...	...	...	...
Geo. West	Beeville	202	23.6	23.0	...	...	...	...	0.6
Hedley	Wellington	203	35.7	34.2	...	...	...	...	1.5
Angelina R.	Jct. Hwy. #26	204	17.1	17.1	...	...	...	...	...
Rising Star	Coleman	206	42.8	...	...	42.3	...	...	0.5
Crosby C/L.	Ralls	207	10.9	10.9	...	...	...	...	...

Independence	Jct. Hy. #90	211	8.8	...	...	8.8	...	...	...
Canyon	State Park	217	12.4	...	...	12.1	...	...	0.3
Jct. Hwy. #95	Heidenheimer	221	5.9	...	5.9	...	...	...	...
Knox City	Munday	222	13.6	13.5	...	...	...	...	0.1
Jct. Hwy. #6— Houston	15.7 Mi. East	225	17.1	...	...	...	...	16.7	0.4
Totals			21,045.9	5,426.2	1,361.9	7,128.2	2,127.6	4,437.0	565.0
Percent of Total			100.0	25.8	6.6	33.8	10.1	21.0	2.7

Type.	Miles	Percent
Rigid Type Pavement (Concrete)	4,437.0	21.0
Non-Rigid Type Pavement (other than concrete)	16,043.9	76.3
Thru Cities	565.0	2.7
Totals	21,045.9	100.0

EXHIBIT No. 1A.

Docket No. 864. Witness: Knapp.

Description of Highway Types in Routes Proposed in Application of A. E. McDonald.

From	To	Via Hwy. No.	Total Dist. Miles	Type of Highway Surface—Miles: Earth Surf.	Gravel, Etc.	Bitu. Top	Asph. Top	Concrete	Thru Cities
State Line (Denison)—Galveston Via Hys. 6-2-6.									
State Line	Hillsboro	6	142.9	5.3	...	30.8	19.7	69.4	17.7
Hillsboro	Waco	2	32.9	...	...	10.5	...	21.5	0.9
Waco	Galveston	6	238.2	6.4	...	55.1	6.5	149.6	20.6
Totals			414.0	11.7	...	96.4	26.2	240.5	39.2
Percent of Total			100%	3%	...	23%	6%	58%	10%
State Line (Gainesville)—Houston Via Hys. 40-10-34-14-32-19.									
State Line	Denton	40	38.4	...	...	28.8	...	6.7	2.9
Denton	Ft. Worth	10	34.4	...	...	21.0	...	11.5	1.9
Ft. Worth	Ennis	34	55.4	4.8	...	22.4	...	22.8	5.4
Ennis	Richland	14	32.6	...	...	...	...	30.8	1.8
Richland	Huntsville	32	106.9	...	...	...	...	106.5	0.4

Huntsville	Houston	19	68.9	...	...	14.3	...	50.3	4.3
Totals			336.6	4.8	...	86.5	...	228.6	16.7
Percent of Total			100%	1%	...	26%	...	68%	5%
		Waco-McAllen Via Hys. 2.6.							
Waco	San Antonio	2	182.8	2.8	12.8	53.2	9.8	88.2	16.0
San. Antonio	Pharr	66	233.5	10.1	14.4	30.9	127.5	47.3	3.3
Pharr	McAllen	4	3.3	...	...	...	...	2.9	0.4
Totals			419.6	12.9	27.2	84.1	137.3	138.4	19.7
Percent of Total			100%	3%	6%	20%	33%	33%	5%
Totals—All Routes			1,170.2	29.4	27.2	267.0	163.5	607.5	75.6
Percent of Total———All Routes			100%	3%	2%	23%	14%	52%	6%

Type.	Miles	Percent
Rigid Type Pavement (Concrete)	607.5	52
Non-Rigid Type Pavement (Other than Concrete)	487.1	42
Thru Cities	75.6	6
Totals	1,170.2	100

EXHIBIT No. 2.

Docket No. 864. Witness: Knapp.

Schedule Showing Width of Non-Rigid Highway Pavements in the State Designated Highway System of Texas.

As Verified by Personal Inspection of Geo. A. Knapp on the Ground.

From	To	Via Hy. No,	Tot. Mis. All Types	Width of Non-Rigid Pavements 16 Ft. & Less Miles	% of Tot.	16 to 18 Feet Miles	% of Tot.	18 Ft & Less Miles	% of Tot.
N. M. Line	Texarkana	1	859.9	115.7	13	212.4	..	...	...
Abilene	Jct. #15	1A	25.2	...	..	...	..	...	..
Jct. #1	Dallas	1B	4.8	...	...	...	..	...	..
Ringgold	Laredo	2	511.3	91.1	18	107.6	21	198.7	39
Burleson	Itasca	2A	37.8	10.6	28	24.8	66	35.4	94
Van Horn	Sabine R.	3	790.6	66.3	09	278.1	35	344.4	44
Seguin	Waelder	3A	46.9	...	..	...	..	...	..
Okla. Line	Boca Chica	4	835.6	40.4	05	120.4	14	160.8	19
N. M. Line	Texarkana	5	636.2	2.9	01	65.4	10	68.3	11
Red R. Br.	Galveston	6	379.8	42.8	11	10.4	.03	53.2	14
N. M. Line	Joaquin	7	549.9	35.8	07	77.1	14	112.9	21
Ark. S/L.	Pt. Arthur	8	302.5	60.2	20	71.7	24	131.9	44
Stratford	Corpus Christi	9	637.7	11.6	.02	110.2	17	121.8	19

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Ft. Stockton ...	Whitesbore ...	10	382.5	55.0	14	113.0	30	168.0	44
Commerce	Okla. Line	11	127.5	3.0	02	90.0	71	93.0	73
Laredo	Rosenberg	12	298.8	13.2	04	87.7	29	100.9	..
N. M. Line	Amarillo	13	72.6	...	..	16.7	23	16.7	23
Gunter	Bremond	14	175.7	8.1	05	72.0	41	80.1	46
N. M. Line	La. Line	15	456.0	35.4	08	100.1	22	135.5	30
Okla. Line	Falfurrias	16	372.6	70.4	19	170.0	46	240.4	65
Pecos	Rio Grande R..	17	149.2	3.8	03	...	..	3.8	03
Estelline	Jct. Hy. #15...	18	200.1	3.1	02	40.8	20	43.9	22
Jct. Hy. #15	Freeport	19	285.6	27.2	10	34.6	12	61.8	22
Nr. Segovia	Hempstead	20	247.6	57.6	23	48.9	20	106.5	43
Lincoln	Sabine R.	21	235.1	42.4	18	12.0	05	54.4	23
Hamilton	Timpson	22	248.5	25.1	10	21.9	09	47.0	19
Okla. Line	Brady	23	250.2	19.1	08	87.3	35	106.4	43
N. M. State Line.	Red River	24	529.6	86.1	16	138.1	26	224.2	42
Okla. State L....	Windthorst ...	25	38.5	15.0	39	6.5	17	21.5	56
Longview	Nr. Nacogdoches	26	65.2	12.8	20	31.2	48	44.0	68
N. M. State L...	Pt. O'Connor ..	27	570.3	129.7	23	104.0	18	233.7	41
Mule Shoe	Okla. Line	28	223.3	...	..	26.6	12	26.6	12
Nr. Rock Sprgs..	Goliad	29	311.1	17.1	05	37.2	12	54.3	17
Okla. Line	Del Rio	30	333.6	28.8	09	77.3	23	106.1	32
Waco	Gladewater ...	31	160.3	27.7	17	22.1	14	49.8	31
Richland	Huntsville	32	107.0	...	..	...	..	...	..

From	To	Via Hy. No.	Tot. Mis. All Types	Width of Non-Rigid Pavements: 16 Ft. & Less Miles	16 Ft. & Less % of Tot.	16 to 18 Feet Miles	16 to 18 Feet % of Tot.	18 Ft & Less Miles	18 Ft & Less % of Tot.
El Paso	Okla. Line	33	232.9	...	..	15.3	07	15.3	07
Jct. Hy. #66	Honey Grove	34	223.3	25.2	11	45.8	21	71.0	34
La. Line	Gregory	35	408.2	104.9	26	34.2	08	139.1	34
Commanche	Freeport	36	263.2	24.5	09	26.4	10	50.9	19
Clarksville	Jacksonville	37	130.5	...	..	49.0	38	49.0	38
Sugarland	Jct. Hwy. #6	38	47.9	...	..	...	..	...	..
Okla. Line	Nr. Beaumont	40	339.1	71.5	.21	98.3	29	169.8	50
Carter Valley	Mt. Home	41	107.8	9.8	.09	39.1	36	48.9	45
Whitewright	Jct. Hy. #15	42	88.5	56.6	.64	19.0	21	75.6	85
Round Rock	Karnack	43	263.7	16.5	.06	49.3	19	65.8	25
Waco	La Grange	44	125.1	33.9	.27	8.3	07	42.2	34
Roans Prairie	Newton - Jasper Co. L.	45	117.5	5.8	.05	16.2	14	22.0	19
Jct. Hy. #66	New Braunfels	46	24.1	12.2	.51	...	..	12.2	51
Ark. S/L.	Jct. Hy. #49	47	67.0	...	..	17.1	26	17.1	26
Progresso	Pt. Brownsville	48	36.2	...	..	2.3	06	2.3	06
Paris	La. S/L	49	120.9	45.0	37	32.5	27	77.5	64
Henrietta	Bowie	50	28.6	...	..	6.1	21	6.1	21
Meadows	McCamey	51	167.4	...	..	128.2	77	128.2	77
Okla. S/L.	Wellington	52	14.0	...	..	...	..	...	..
Lampasas	Jct. Hy. #44	53	76.7	...	..	...	..	...	..

Jct. Hy. #130	Van Horn	54	55.0	...	..	...	..	...	..	
Rock Springs	Uvalde	55	70.6	41.2	58	9.1	13	50.3	71	
N. M. S/L.	Okla. S/L.	56	92.8	...	..	...	..	...	..	
Nacona	Bowie	59	19.5	...	..	10.4	53	10.4	53	
Wallis	Matagorda	60	63.7	...	..	17.1	27	17.1	27	
Devers	Anahuac	61	21.5	9.1	42	5.2	24	14.3	66	
Buma	Jct. Hy. #3	62	24.9	24.9	100	...	..	24.9	100	
Zavala	Sabine R.	63	67.2	37.6	56	...	..	37.6	56	
Wills Point	La. S/L.	64	137.3	...	..	36.3	26	36.3	26	
Mt. Pleasant	Gladewater	65	45.5	7.0	15	22.2	49	29.2	64	
Wichita Falls	Rio Grande R.	66	531.6	73.1	14	85.6	16	158.7	30	
Graham	Waco	67	198.3	70.3	35	49.7	25	120.0	60	
Stephenville	Dallas	68	106.1	41.0	39	32.4	30	73.4	69	
Cameron	Hearne	69	28.6	...	..	...	..	...	..	
Jayton	Jct. Hy. #30	70	135.8	...	..	56.5	42	56.5	42	
Austin	Jct. Hy. #35	71	151.8	7.0	05	39.6	26	46.6	31	
Jct. Hy. #20	Jct. Hy. #16	72	126.0	14.2	11	75.4	60	89.6	71	
Sealy	Eureka	73	45.1	...	..	15.5	34	15.5	34	
Rochelle	Burnet Co./L.	74	99.7	...	..	26.3	26	26.3	26	
Goldthwaite	Lometa	74A	21.2	...	..	...	..	...	..	
Tex. Okla. S/L.	Amarillo	75	102.2	...	..	17.0	17	17.0	17	
Eagle Pass	La Pryor	76	46.1	...	...	...	..	...	..	
Naples	La. S/L.	77	42.0	...	..	30.3	72	30.3	72	

From	To	Via Hy. No.	Tot. Mis. All Types	Width of Non-Rigid Pavements: 16 Ft. & Less Miles	% of Tot.	16 to 18 Feet Miles	% of Tot.	18 Ft & Less Miles	% of Tot.
Okla. Line	Garland	78	85.0	44.3	52	14.7	17	59.0	69
Wichita Falls	Throckmorton	79	69.5	28.0	40	...	..	28.0	40
Wimberly	Nixon	80	67.7	14.0	21	3.0	04	17.0	25
De Leon	San Antonio	81	258.5	44.3	17	19.8	08	64.1	25
N. M. S/L.	Sanderson	82	147.1	18.1	12	5.2	04	23.3	16
N. M. S/L.	Jct. Hy. #70	84	147.0	...	..	24.1	16	24.1	16
Del Rio	Dilley	85	143.8	79.8	55	45.4	32	125.2	87
Bovina	Turkey	86	103.7	...	..	3.5	03	3.5	03
Milam	High Island	87	181.9	...	..	15.1	08	15.1	08
Tex.-Okla. S/L.	Clarendon	88	75.1	...	..	...	..	...	..
Weatherford	Jct. Hwy. #1	89	45.3	...	..	...	..	...	..
Madisonville	Brenham	90	68.4	...	..	34.9	51	34.9	51
Red River	Denison	91	13.1	...	..	...	..	...	..
Hamlin	Stamford	92	17.8	...	..	...	..	...	..
Trinity	Lufkin	94	53.1	...	..	29.8	56	29.8	56
Temple	Hochheim	95	93.8	47.4	51	8.9	09	56.3	60
Corpus Christi	Harlingen	96	45.1	...	..	...	..	...	..
Jct. Hwy. #27	Nr. Fullerton	97	54.1	...	..	27.5	51	27.5	51
Baston	Simms	98	9.5	...	..	9.5	100	9.5	100
Barreda	Pt. Isabel	100	24.6	...	..	...	..	...	..
Snyder	Colorado	101	24.9	...	..	...	..	...	..

Taylor	Lexington	102	28.5	7.3	26	6.3	22	13.6	48		
Crockett	Ratcliff	103	19.5	...	..	...	..	...	..		
E. Liberty Hill	Circleville	104	27.1	...	..	14.1	52	14.1	52		
Navasota	Cleveland	105	66.5	...	...	3.6	05	3.6	05		
Crockett	Woodville	106	74.1	...	..	17.7	24	17.7	24		
Strawn	Stephenville	108	32.8	...	...	...	..	...	..		
Tyler	Rusk	110	44.3	44.3	100	...	..	44.3	100		
Edna	Midfield	111	26.3	...	..	...	..	...	..		
Gonzales	Karnes City	112	51.9	...	..	9.7	19	9.7	19		
Victoria Co./L.	Austwell	113	15.1	...	..	4.4	29	4.4	29		
Bridgeport	Dallas	114	73.2	...	..	...	..	...	..		
Kermit	Pyote	115	26.9	...	..	26.9	100	26.9	100		
Okla. S/L.	Claude	117	156.1	...	..	33.4	21	33.4	21		
Ft. Davis	Alpine	118	24.0	...	..	7.8	33	7.8	33		
Yorktown	Goliad	119	15.3	...	..	...	..	...	..		
Old Glory	New Castle	120	86.7	...	..	8.9	10	8.9	10		
Birdville	Jct. Hwy. #40	121	19.5	...	..	...	..	...	..		
Parsons Sw.	Cleburne	122	26.9	17.9	67	...	..	17.9	67		
San Marcos	Stockdale	123	45.3	...	..	...	..	...	..		
Stowell	Galveston	124	48.4	...	..	43.4	90	43.4	90		
Jct. Hwy. #61	Beaumont	125	44.9	...	..	39.0	87	39.0	87		
Con Can	Sabinal	127	21.0	21.0	100	...	..	21.0	100		
Victoria	Alice	128	109.6	11.8	11	37.6	34	49.4	45		

From	To	Via Hy. No.	Tot. Mis. All Types	Width of Non-Rigid Pavements: 16 Ft. & Less Miles	16 Ft. & Less % of Tot.	16 to 18 Feet Miles	16 to 18 Feet % of Tot.	18 Ft & Less Miles	18 Ft & Less % of Tot.
El Paso	N. M. S/L.	130	128.7	...	..	96.6	75	96.6	75
Brackettville	Spofford	131	9.2	...	..	9.2	100	9.2	100
S. J. Bat. Grnd.	LaPorte Rd.	134	8.8	4.4	50	...	..	4.4	50
Jct. Hwy. #31	Troup	135	33.5	...	..	7.8	23	7.8	23
Carson Co./L.	Amarillo	136	30.4	...	..	24.6	81	24.6	81
Lubbock	Meadows	137	24.9	...	..	12.8	51	12.8	51
Tex. Okla. S/L.	Jct. Hwy. #4	138	11.1	...	..	...	..	...	..
Chilton	Marlin	139	11.4	...	..	...	..	...	..
Jct. Hwy. #66	Kingsville	141	14.5	...	..	...	..	...	..
Martindale	Lockhart	142	11.0	...	..	...	..	...	..
Glen Rose	Meridian	144	23.4	11.0	47	...	..	11.0	47
E. McKinney	Princeton	145	1.2	1.2	100	...	..	1.2	100
Polk-Liberty Co. L.	Tex. City Jct.	146	112.7	14.6	13	22.4	20	37.0	33
San Augustine	Zavalla	147	36.5	6.3	17	...	..	6.3	17
Red River Br.	Henrietta	148	28.5	13.6	48	3.9	13	17.5	61
Longview	Carthage	149	41.7	...	..	8.6	21	8.6	21
New Waverly	Shepherd	150	34.0	...	..	...	..	...	..
Menard	Mason	151	39.6	...	..	...	..	...	..
Pampa	Wheeler	152	35.1	...	..	...	..	...	..
Cooper	Quitman	154	45.8	...	..	11.6	25	11.6	25

Gilmer	Marshall	155	39.2	...	..	...	..	...	..	
Point Blank	Cold Springs	156	13.5	...	..	...	..	...	..	
Jct. Hwy. #23	Breckenridge	157	31.2	...	..	30.5	98	30.5	98	
Robert Lee	S. of Abilene	158	50.5	...	..	10.7	21	10.7	21	
Oldenburg	Hempstead	159	50.6	...	..	15.7	31	15.7	31	
Denison	Jct. Hwy. #78	160	29.3	1.8	06	...	..	1.8	06	
Fannin	Fannin Park	162	0.7	...	..	...	..	...	..	
Barnhart	Ozona	163	29.5	...	..	29.5	100	29.5	100	
Mart	Limestone C/L	164	11.0	...	..	2.1	19	2.1	19	
Austin Cemetery	Driveways	165	0.9	0.9	100	...	...	0.9	100	
Ft. Davis	McDonald Observ.	166	17.3	...	..	...	..	...	..	
Tomb Miers Expd.	La Grange	167	1.0	1.0	100	...	..	1.0	100	
S. of Canidan	Jct. Hy. #4 & 33	170	2.7	...	..	...	..	...	..	
Hillsboro	Hubbard	171	27.8	17.9	64	8.8	32	26.7	96	
Ganado	Olivia	172	28.2	...	..	...	..	...	..	
Walnut Spgs.	Cleburne	174	43.6	33.6	77	...	..	33.6	77	
Tyler	Kilgore	176	25.3	...	..	...	..	...	..	
Blessing	Wye	177	0.8	...	..	...	..	...	..	
Hartley	Moore Co./L.	178	13.3	...	..	...	..	...	..	
Teague	Dew	179	8.4	...	..	...	..	...	..	
Jct. Hwy. #5	Annona	180	3.1	3.1	100	...	..	3.1	100	

From	To	Via Hy. No.	Tot. Mis. All Types	Width of Non-Rigid Pavements: 16 Ft. & Less Miles	16 Ft. & Less % of Tot.	16 to 18 Feet Miles	16 to 18 Feet % of Tot.	18 Ft & Less Miles	18 Ft & Less % of Tot.
Gary	Jct. Hwy. #8	181	5.1	...	...	5.1	100	5.1	100
Alba	Quitman	182	10.6	...	..	...	..	...	..
Dallas	Mesquite	183	11.2	...	..	...	..	...	..
Bronson	Hemphill	184	11.1	...	..	...	..	...	..
Green Lake	Seadrift	185	7.5	7.5	100	...	..	7.5	100
Willacy-Hidalgo Co./L.	N. of Raymondville	186	5.8	...	...	...	...	...	...
Cisco	Jct. Hwy. #67	187	8.7	...	..	8.7	100	8.7	100
Bastrop Co./L.	Jct. Hwy. #71	O. S. R.	91.7	...	..	...	..	...	..
Brookston	Roxton	188	5.5	...	..	...	..	...	..
Albany	Coleman	191	16.4	...	..	...	..	...	..
Mingus	Gordon	193	6.5	6.3	97	...	..	6.3	97
Dimmitt	Plainview	194	29.0	...	..	...	..	...	..
Jct. Hwy. #74	Georgetown	195	23.1	...	..	...	..	...	..
Kent	Ft. Stockton	196	76.3	33.6	44	31.0	41	64.6	85
Canton	Mabank	198	20.6	...	..	...	..	...	..
Olney	Jacksboro	199	31.7	...	..	...	..	...	..
Geo. West	Beeville	202	23.6	...	..	...	..	...	..
Hedley	Wellington	203	35.7	...	..	...	..	...	..
Angelina R.	Jct. Hy. #26	204	17.1	...	..	...	..	...	..

Rising Star	Coleman	206	42.8			42.3	99	42.3	99
Crosby C/L.	Ralls	207	10.9	...	..	...	...	...	..
Independence	Jct. Hy. #90	211	8.8	...	..	8.8	100	8.8	100
Canyon	State Park	217	12.4	...	..	...	..	...	..
Jct. Hwy. #95	Heidenheimer	221	5.9	5.9	100	...	..	5.9	100
Knox City	Munday	222	13.6	...	..	...	..	...	..
Jct. Hwy. #6— Houston	15.7 Mi. East	225	17.1	...	..	...	..	...	..
Totals			21,045.9	2,430.2	12	4,416.7	21	6,846.9	33
Total Non-Rigid except Earth and Cities			10,617.7	2,430.2	23	4,416.7	41	6,846.9	64
Total Concrete			4,437.0	175.7	4	2,799.9	63	2,975.6	67
Total All Types except Earth and Cities			15,054.7	2,605.9	17	7,216.6	48	9,822.5	65

EXHIBIT No. 2A.

Docket No. 864. Witness: Knapp.

Schedule Showing Width of Non-Rigid Highway Pavements in Routes Specified in Application of A. E. McDonald.

From	To	Via Hy. No.	Tot. Mls. All Types	Width of Non-Rigid Pavements: 16 Ft. & Less Miles	% of Tot.	16 to 18 Feet Miles	% of Tot.	18 Ft & Less Miles	% of Tot.
State Line (Denison)—Galveston Via Hys. 6-2-6.									
State Line	Hillsboro	6	142.9	...	...	42.5	30	42.5	30
Hillsboro	Waco	2	32.9	...	...	0.6	2	0.6	2
Waco	Galveston	6	238.2	...	..	74.2	31	74.2	31
Totals			414.0	...	...	117.3	28	117.3	28
State Line (Gainesville)—Houston Via Hys. 40-10-34-14-32-19.									
State Line	Denton	40	38.4	14.7	38	14.1	37	28.8	75
Denton	Ft. Worth	10	34.4	17.4	51	3.6	10	21.0	61
Ft. Worth	Ennis	34	55.4	...	..	22.4	..	22.4	..
Ennis	Richland	14	32.6	...	..	...	..	...	..

Richland	Huntsville	32	106.9	...	..	...	..	...	..
Huntsville	Houston	19	68.9	...	..	14.3	21	14.3	21
Totals			336.6	32.1	10	54.4	16	86.5	26

Waco-McAllen Via Hys. 2-66-4.

Waco	San Antonio	2	182.8	0.5	..	21.1	12	21.6	12
San Antonio	Pharr	66	233.5	33.9	15	84.6	36	118.5	51
Pharr	McAllen	4	3.3	...	..	...	..	...	..
Totals			419.6	34.4	8	105.7	25	140.2	33
Totals—All Routes			1,170.2	66.5	5	277.4	24	343.9	29

Note: Non-rigid surfaces, except earth, constitute 39% of total route mileages; therefore 75% of non-rigid pavements are 18' or less in width.

EXHIBIT No. 3.

Docket No. 864. Witness: Knapp.

Concrete.

Schedule Showing Width of Rigid Highway Pavements in the State Designated Highway System of Texas.

As Verified by Personal Inspection of Geo. A Knapp on the Ground.

From	To	Via Hy. No.	Tot. Mls. All Types	Width of Rigid Pavements: 16 Ft. & Less Miles	% of Tot.	16 to 18 Feet Miles	% of Tot.	18 Ft & Less Miles	% of Tot.
N. M. Line	Texarkana	1	859.9	1.3	..	195.8	23	197.1	23
Abilene	Jct. #15	1A	25.2	...	..	7.9	31	7.9	31
Jct. #1	Dallas	1B	4.8	...	..	....	..	....	..
Ringgold	Laredo	2	511.3	...	..	25.8	05	25.8	05
Burleson	Itasca	2A	37.8	....	..	....	..	....	..
Van Horn	Sabine R.	3	790.6	14.0	02	88.1	11	102.1	13
Seguin	Waelder	3A	46.9	....	..	....	..	....	..
Okla. Line	Boca Chica	4	835.6	12.9	02	142.0	17	154.9	19
New Mex. Line	Texarkana	5	636.2	18.0	03	236.8	37	254.8	40
Red R. Br.	Galveston	6	379.8	...	..	116.7	31	116.7	31
New Mex. Line	Joaquin	7	549.9	..	..	52.5	10	52.5	10
Ark. Line	Pt. Arthur	8	302.5	6.0	02	13.9	05	19.9	07
Stratford	Corpus Christi	9	637.7	...	..	82.3	13	82.3	13

Ft. Stockton	Whitesboro	10	382.5	1.1	..	29.9	08	31.0	08	
Commerce	Okla. Line	11	127.5	...	..	...	..	...	..	
Laredo	Rosenberg	12	298.8	...	..	175.9	59	175.9	59	
N. M. Line	Amarillo	13	72.6	...	..	...	..	...	..	
Gunter	Bremond	14	175.7	...	..	19.7	11	19.7	11	
N. M. Line	La. Line	15	456.0	...	..	38.0	08	38.0	08	
Okla. Line	Falfurrias	16	372.6	1.5	01	38.5	10	40.0	11	
Pecos	Rio Grande R.	17	149.2	...	..	...	..	...	..	
Estelline	Jct. Hy. #15	18	200.1	...	..	24.4	12	24.4	12	
Jct. Hy. #15	Freeport	19	285.6	...	..	113.8	40	113.8	40	
Nr. Segovia	Hempstead	20	247.6	22.6	09	6.8	03	29.4	12	
Lincoln	Sabine R.	21	235.1	6.9	03	21.1	09	28.0	12	
Hamilton	Timpson	22	248.5	...	..	20.5	..	20.5	..	
Okla. Line	Brady	23	250.2	3.5	02	15.9	06	19.4	08	
N. M. State L.	Red River	24	529.6	17.0	03	51.4	10	68.4	13	
Okla. State L.	Windthorst	25	38.5	4.1	11	...	..	4.1	11	
Longview	Nr. Nacogdoches	26	65.2	...	..	...	..	...	..	
N. M. State L.	Pt. O'Connor	27	570.3	...	..	36.7	06	36.7	06	
Mule Shoe	Okla. Line	28	223.3	...	..	78.9	35	78.9	35	
Nr. Rock Sprgs.	Goliad	29	311.1	...	..	156.3	47	156.3	47	
Okla. Line	Del Rio	30	333.6	6.6	04	26.9	17	33.5	21	
Waco	Gladewater	31	160.3	...	..	106.5	100	106.5	100	
Richland	Huntsville	32	107.0	...	..	...	..	...	..	
El Paso	Okla. Line	33	232.9	...	..	73.7	32	73.7	32	

From	To	Via Hy. No.	Tot. Mis. All Types	Width of Rigid Pavements: 16 Ft. & Less Miles	% of Tot.	16 to 18 Feet Miles	% of Tot.	18 Ft & Less Miles	% of Tot.
Jct. Hy. #66	Honey Grove	34	223.3	...	..	...	..	...	..
La. Line	Gregory	35	408.2	...	..	110.8	27	110.8	27
Commanche	Freeport	36	263.2	...	..	86.8	33	86.8	33
Clarksville	Jacksonville	37	130.5	5.3	04	...	..	5.3	04
Sugarland	Jct. Hwy. #6	38	47.9	...	..	...	..	...	..
Okla. Line	Nr. Beaumont	40	339.1	...	..	32.3	10	32.3	10
Carter Valley	Mt. Home	41	107.8	...	..	...	..	...	..
Whitewright	Jct. Hy. #15	42	88.5	1.3	01	0.5	01	1.8	02
Round Rock	Karnack	43	263.7	...	..	32.8	12	32.8	12
Waco	La Grange	44	125.1	...	..	...	..	...	..
Roans Prairie	Newton - Jasper Co. S/L.	45	117.5	...	..	23.3	20	23.3	20
Jct. Hy. #66	New Braunfels	46	24.1	6.0	09	15.6	23	21.6	32
Ark. S/L.	Jct. Hy. #49	47	67.0	...	..	...	..	...	..
Progresso	Pt. Brownsville	48	36.2	7.4	20	23.1	64	30.5	84
Paris	La. S/L	49	120.9	...	..	...	..	...	..
Henrietta	Bowie	50	28.6	...	..	19.5	68	19.5	68
Meadows	McCamey	51	167.4	...	..	...	..	...	..
Okla. S/L.	Wellington	52	14.0	...	..	...	..	...	..
Lampasas	Jct. Hy. #44	53	76.7	...	..	21.0	27	21.0	27
Jct. Hy. 130	Van Horn	54	55.0	...	..	...	..	...	..

Rock Springs	Uvalde	55	70.6						
N. M. S/L.	Okla. S/L.	56	92.8						
Nacona	Bowie	59	19.5						
Wallis	Matagorda	60	63.7			31.2	49	31.2	49
Devers	Anahuac	61	21.5						
Buma	Jct. Hy. #3	62	24.9						
Zavala	Sabine R.	63	67.2						
Wills Point	La. S/L.	64	137.3	24.3	18			24.3	18
Mt. Pleasant	Gladewater	65	45.5						
Wichita Falls	Rio Grande R.	66	531.6			26.4	05	26.4	05
Graham	Waco	67	198.3						
Stephenville	Dallas	68	106.1						
Cameron	Hearne	69	28.6						
Jayton	Jct. Hy. #30	70	135.8						
Austin	Jct. Hy. #35	71	151.8			47.0	31	47.0	31
Jct. Hy. #20	Jct. Hy. #16	72	126.0			17.3		17.3	14
Sealy	Eureka	73	45.1						
Rochelle	Burnet Co. L.	74	99.7						
Goldthwaite	Lometa	74A	21.2						
Tex. Okla. S/L.	Amarillo	75	102.2			68.7	67	68.7	67
Eagle Pass	La Pryor	76	46.1						
Naples	La. S/L.	77	42.0						
Okla. Line	Garland	78	85.0						

From	To	Via Hy. No.	Tot. Mis. All Types	Width of Rigid Pavements: 16 Ft. & Less Miles	% of Tot.	16 to 18 Feet Miles	% of Tot.	18 Ft & Less Miles	% of Tot.
Wichita Falls	Throckmorton	79	69.5	2.8	04	37.0	53	39.8	57
Wimberly	Nixon	80	67.7	...	..	...	..	...	..
De Leon	San Antonio	81	258.5	...	..	...	..	...	..
N. M. S/L.	Sanderson	82	147.1	...	..	...	..	...	..
N. M. S/L.	Jct. Hy. #70	84	147.0	...	..	...	..	...	..
Del Rio	Dilley	85	143.8	...	..	...	..	...	..
Bovina	Turkey	86	103.7	...	..	...	..	...	..
Milam	High Island	87	181.9	1.6	01	4.0	02	5.6	03
Tex. Okla. S/L.	Clarendon	88	75.1	...	..	...	..	...	..
Weatherford	Jct. Hwy. #1	89	45.5	...	..	...	..	...	..
Madisonville	Brenham	90	68.4	6.5	10	14.7	21	21.2	31
Red River	Denison	91	13.1	...	..	12.1	92	12.1	92
Hamlin	Stamford	92	17.8	...	...	...	..	...	..
Trinity	Lufkin	94	53.1	...	..	...	..	...	..
Temple	Hochheim	95	93.8	...	..	21.9	23	21.9	23
Corpus Christi	Harlingen	96	45.1	...	..	42.5	94	42.5	94
Jct. Hwy. #27	Fullerton	97	54.1	...	..	...	..	...	..
Boston	Simms	98	9.5	...	..	...	..	...	..
Barreda	Pt. Isabel	100	24.6	...	..	...	..	...	..
Snyder	Colorado	101	24.9	...	..	...	..	...	..
Taylor	Lexington	102	28.5	...	..	...	..	...	..

Crockett	Ratcliff	103	19.5							
E. Liberty Hill	Circleville	104	27.1							
Navasota	Cleveland	105	66.5							
Crockett	Woodville	106	74.1							
Strawn	Stephenville	108	32.8							
Tyler	Rusk	110	44.3							
Edna	Midfield	111	26.3							
Gonzales	Karnes City	112	51.9							
Victoria Co./L.	Austwell	113	15.1							
Bridgeport	Dallas	114	73.2							
Kermit	Pyote	115	26.9							
Okla. S/L.	Claude	117	156.1			20.9	13	20.9	13	
Ft. Davis	Alpine	118	24.0							
Yorktown	Goliad	119	15.3							
Old Glory	New Castle	120	86.7							
Birdville	Jct. Hwy. #40	12'	19.5							
Parsons Sw.	Cleburne	122	26.9							
San Marcos	Stockdale	123	45.3							
Stowell	Galveston	124	48.4							
Jct. Hwy. #61	Beaumont	125	44.9	5.0	11			5.0	11	
Con Can	Sabinal	127	21.0							
Victoria	Alice	128	109.6			60.2	55	60.2	55	
El Paso	N. M. S/L.	130	128.7			1.0	01	1.0	01	

From	To	Via Hy. No.	Tot. Mis. All Types	Width of Rigid Pavements: 16 Ft. & Less Miles	16 Ft. & Less % of Tot.	16 to 18 Feet Miles	16 to 18 Feet % of Tot.	18 Ft & Less Miles	18 Ft & Less % of Tot.
Brackettville	Spofford	131	9.2	...	..	...	..	...	..
S. J. Bat. Grnd.	LaPorte Rd.	134	8.8	...	..	0.7	08	0.7	08
Jct. Hwy. #31	Troup	135	33.5	...	..	...	..	...	..
Carson Co./L.	Amarillo	136	30.4	...	..	...	..	...	..
Lubbock	Meadows	137	24.9	...	..	...	..	...	..
Tex. Okla. S/L.	Jct. Hwy. #4	138	11.1	...	..	...	..	...	..
Chilton	Marlin	139	11.4	...	..	...	..	...	..
Jct. Hwy. #66	Kingsville	141	14.5	...	..	...	..	...	..
Martindale	Lockhart	142	11.0	...	..	...	..	...	..
Glen Rose	Meridian	144	23.4	...	..	...	..	...	..
E. McKinney	Princeton	145	1.2	...	..	...	..	...	..
Polk-Liberty Co. L.	Tex. City Jct.	146	112.7	...	..	...	..	...	..
San Augustine	Zavalla	147	36.5	...	..	...	..	...	..
Red River Br.	Henrietta	148	28.5	...	..	...	..	...	..
Longview	Carthage	149	41.7	...	..	...	..	...	..
New Waverly	Shepherd	150	34.0	...	..	0.3	01	0.3	01
Menard	Mason	151	39.6	...	..	...	..	...	..
Pampa	Wheeler	152	35.1	...	..	...	..	...	..
Cooper	Quitman	154	45.8	...	..	...	..	...	..
Gilmer	Marshall	155	39.2	...	..	...	..	...	..

Point Blank	Cold Springs	156	13.5	...	..	...	..	...	..		
Jct. Hwy. #23	Breckenridge	157	31.2	...	..	...	..	...	..		
Robert Lee	S. of Abilene	158	50.5	...	..	...	..	...	..		
Oldenburg	Hempstead	159	50.6	..	..	15.4	30	15.4	30		
Denison	Jct. Hwy. #78	160	29.3	...	....	14.7	50	14.7	50		
Fannin	Fannin Park	162	0.7	...	..	...	..	...	..		
Barnhart	Ozona	163	29.5	...	..	...	..	...	..		
Mart	Limestone C/L.	164	11.0	...	..	...	..	...	..		
Austin Cemetery	Driveways	165	0.9	...	..	...	..	...	..		
Ft. Davis	McDonald Obs.	166	17.3	...	..	...	..	...	..		
Tomb Miers Expd.	La Grange	167	1.0	...	..	...	..	...	..		
S. of Canadian	Jct. Hy. #4 & 33	170	2.7	...	..	...	..	...	..		
Hillsboro	Hubbard	171	27.8	...	..	...	..	...	..		
Ganado	Olivia	172	28.2	...	..	...	..	...	..		
Walnut Spgs.	Cleburne	174	43.6	...	..	...	..	...	..		
Tyler	Kilgore	176	25.3	...	..	...	..	...	..		
Blessing	Wye	177	0.8	...	..	0.8	100	0.8	100		
Hartley	Moore Co./L.	178	13.3	...	..	...	..	...	..		
Teague	Dew	179	8.4	...	..	...	..	...	..		
Jct. Hwy. #5	Annona	180	3.1	...	..	...	..	...	..		
Gary	Jct. Hwy. #8	181	5.1	...	..	...	..	...	..		
Alba	Quitman	182	10.6	....	..	...	..	...	..		

From	To	Via Hy. No.	Tot. Mis. All Types	Width of Rigid Pavements 16 Ft. & Less Miles	% of Tot.	16 to 18 Feet Miles	% of Tot.	18 Ft & Less Miles	% of Tot.
Dallas	Mesquite	183	11.2	...	..	0.7	06	0.7	06
Bronson	Hemphill	184	11.1	...	..	...	..	...	..
Green Lake	Seadrift	185	7.5	...	..	...	..	...	..
Willacy-Hidalgo Co./L.	N. of Raymondville	186	5.8	...	..	...	..	...	..
Cisco	Jct. Hwy. #67	187	8.7	...	..	...	..	...	..
Bastrop Co./L.	Jct. Hwy. #71	O. S. R.	91.7	...	..	...	..	...	..
Brookston	Roxton	188	5.5	...	..	...	..	...	..
Albany	Coleman	191	16.4	...	..	...	..	...	..
Mingus	Gordon	193	6.5	...	..	...	..	...	..
Dimmitt	Plainview	194	29.0	...	..	...	..	...	..
Jct. Hwy. #74	Georgetown	195	23.1	...	..	...	..	...	..
Kent	Ft. Stockton	196	76.3	...	..	...	..	...	..
Canton	Mabank	198	20.6	...	..	...	..	...	..
Olney	Jacksboro	199	31.7	...	..	...	..	...	..
Geo. West	Beeville	202	23.6	...	..	...	..	...	..
Hedley	Wellington	203	35.7	...	..	...	..	...	..
Angelina R.	Jct. Hy. #26	204	17.1	...	..	...	..	...	..
Rising Star	Coleman	206	42.8	...	..	...	..	...	..
Crosby C/L.	Ralls	207	10.9	...	..	...	..	...	..

Independence	Jct. Hy. #90	211	8.8	...	..	...	..	...	..
Canyon	State Park	217	12.4	...	..	...	..	...	..
Jct. Hwy. #95	Heidenheimer	221	5.9	...	..	...	..	...	..
Knox City	Munday	222	13.6	...	..	...	..	...	..
Jct. Hwy. #6— Houston	15.7 Mi. East	225	17.1	...	..	...	..	...	..
Totals			21,045.9	175.7	1	2,799.9	13	2,975.6	14
Total Concrete			4,437.0	175.7	4	2,799.9	63	2,975.6	67

EXHIBIT No. 3A.

Docket No. 864. Witness: Knapp.

Schedule Showing Width of Rigid Highway Pavements in Routes Specified in Application of A. E. McDonald.

From	To	Via Hy. No.	Tot. Mis. All Types	Width of Rigid Pavements: 16 Ft. & Less Miles	16 Ft. & Less % of Tot.	16 to 18 Feet Miles	16 to 18 Feet % of Tot.	18 Ft & Less Miles	18 Ft & Less % of Tot.
State Line (Denison)—Galveston Via Hys. 6-2-6.									
State Line	Hillsboro	6	142.9	23.4	16	7.4	5	30.8	21
Hillsboro	Waco	2	32.9	10.5	33	..	..	10.5	33
Waco	Galveston	6	236.2	19.5	8	3.5	1	23.0	10
Totals			414.0	53.4	13	10.9	3	64.3	16
State Line (Gainesville)—Houston Via Hys. 40-10-34-14-32-19.									
State Line	Denton	40	38.4	...	..	...	..	...	..
Denton	Ft. Worth	10	34.4	...	..	...	..	...	..
Ft. Worth	Ennis	34	55.4	...	..	...	..	...	..

Ennis	Richland	14	32.6	...	..	...	..	...	..
Richland	Huntsville	32	106.9	...	..	86.8	81	86.8	81
Huntsville	Houston	19	68.9	...	..	42.7	62	42.7	62
Totals			336.6	...	..	129.5	38	129.5	38

Waco-McAllen Via Hys. 2-66-4.

Waco	San Antonio	2	182.8	...	..	13.4	..	13.4	..
San Antonio	Pharr	66	233.5	...	..	16.1	..	16.1	..
Pharr	McAllen	4	3.3	...	..	2.9	..	2.9	..
Totals			4196	...	..	32.4	8	32.4	8
Totals—All Routes			1,170.2	53.4	4.5	172.8	14.8	226.2	19.3

Note: Rigid surfaces constitute 51.8% of total route mileage; therefore 37.2% of rigid pavements is 18' or less in width.

EXHIBIT No. 4.

Docket No. 864.

Witness: Knapp.

Statement Showing Partial List of Highway Bridges Having a Safe Loading Capacity of Less Than Seven Tons, Which Are Located Upon State Designated Highways of Texas.

As Verified by Personal Inspection of Geo. A. Knapp on the Ground.

Note:—The following list of bridges shows their safe loading capacity in terms of their condition when new. No deduction has been made for physical depreciation as described under "condition."

Survey No.	Location of Bridge	Name of Stream	1 or 2 Way	Safe Load (Tons)	Condition
		Highway No. 3.			
173	0.3 Mi. W. Gonzales	San Marcos R.	2	4.7.	Fair
		Highway No. 5.			
532	1.1 Mi. E. Jct. #40	Unknown	2	3.0	Poor
"	0.8 " " " "	"	2	4.1	Good
		Highway No. 6.			
535	0.3 Mi. S. of Forrest Av.—Dallas	N. App. Trinity R.	2	3.7	Poor
"		S. " " "	2	3.7	Fair

"	1.1	" " " " " "	.....	Trinity R. Relief	2	3.9	Good
541	4.8	Mi. N. of Bremond	.....	Unknown	2	3.4	Fair
121	4.5	" " " "	.....	"	2	3.5	"
"	4.4	" " " "	.....	"	2	3.5	"
"	4.3	" " " "	.....	"	2	3.5	"
"	4.2	" " " "	.....	"	2	3.5	"
"	4.1	" " " "	.....	"	2	3.5	"
541	2.9	" " " "	.....	"	2	3.4	"
305	1.7	" " " "	.....	Small Branch	2	3.0	"
542	0.3	" " " "	.....	Unknown	2	2.0	"
120	8.2	" " " Calvert	.....	Barton Branch	1	3.5	"
542	6.3	" " " "	.....	.....	1	4.5	Poor
119	3.8	" " " "	.....	Walnut Cr.	2	3.5	Good
543	1.9	" " " "	.....	Unknown	2	3.7	"
119	0.4	" " " Hearne	.....	Sandy Cr.	2	3.5	"
543	0.1	" " " "	.....	Unknown	2	3.7	"

Highway No. 8.

352	8.8	Mi. N. of Carthage	.....	Sabine R.	1	6.0	Fair
345	5.6	" " " Silsbee	.....	Unknown	2	5.4	"
"	5.1	" " " "	.....	"	2	5.4	"
"	4.6	" " " "	.....	Neches R. Relief	2	5.4	"

Survey No.	Location of Bridge	Name of Stream	1 or 2 Way	Safe Load (Tons)	Condition
	Highway No. 9.				
286	2.1 Mi. S. Jct. with Hy. #66	Unknown	1	3.6	Good
"	2.9 " " " " " "	"	1	3.6	"
285	5.8 " " " " " "	Sulphur Cr.	1	3.6	"
"	12.4 " " " " " "	Unknown	1	7.0	Fair
"	13.8 " " " " " "	Little Gambol Cr.	1	3.6	"
"	16.0 " " " " " "	Unknown	1	3.0	"
284	16.0 " " " " " "	Gambol Cr.	1	4.4	Good
"	17.9 " " " " " "	Unknown	1	3.0	"
"	18.1 " " " " " "	"	1	4.0	"
"	18.3 " " " " " "	"	1	3.0	Poor
"	13.9 " N. " " " #12	Mullos Cr.	1	4.0	Fair
"	11.9 " " " " " "	Unknown	1	3.6	"
283	9.4 " " " " " "	"	1	3.0	"
"	9.1 " " " " " "	"	1	4.4	"
"	8.4 " " " " " "	"	1	3.5	"
"	8.0 " " " " " "	"	1	3.8	"
"	7.5 " " " " " "	"	1	3.0	"
282	4.7 " " " " " "	"	1	3.0	"

Highway No. 14.

149	1.0	Mi. S. Gunter	"	1	5.3	Fair
"	1.8	" " "	"	1	5.3	"
"	2.0	" " "	"	1	5.4	"
150.	2.5	" " "	"	1	6.3	"
151	15.4	" " "	"	2	4.8	"
153	9.7	" N. of N. C/L Dallas	McKamey Branch	2	6.2	"
528	2.9	" S. " S. " "	Trinity R. Relief	2	6.4	"
"	3.3	" " " " " "	" " "	2	6.4	"
"	3.5	" " " " " "	" " "	2	6.4	"
527	5.1	" " " " " "	5 Mile Cr.	2	6.4	"
"	5.2	" " " " " "	" " "	2	6.4	"
"	13.7	" " " " " "	Unknown	2	3.1	"
"	13.9	" " " " " "	"	2	4.3	"
"	13.9	" " " " " "	"	2	4.0	"
"	14.1	" " " " " "	"	2	5.0	"

Highway No. 15.

38	6.1	Mi. E. of Dallas		2	6.2	Good
40	8.6	" " " "		2	6.2	"
4	8.9	" " " "		2	6.2	"
"	9.0	" " " "		2	6.2	"
64	1.1	" W. of Longview		2	4.4	"

Survey No.	Location of Bridge	Name of Stream	1 or 2 Way	Safe Load (Tons)	Condition
	Highway No. 16.				
8	7.4 Mi. S. of San Antonio	Salado Cr.	2	3.0	Good
"	19.7 " " " " "	" "	2	4.0	"
273	7.4 " N. " Beeville	Media Cr.	2	4.9	"
	Highway No. 19.				
300	29.8 Mi. N. of N. C/L Houston	San Jacinto R. R.	2	6.2	Good
"	29.9 " " " " " " "	" " " "	2	6.2	"
"	30.6 " " " " " " "	" " " "	2	6.2	"
364	13.6 " S. " Trinity	Unknown	2	6.2	"
	Highway No. 21.				
77	0.6 Mi. E. of Alto	Larison Cr.	2	5.1	Good
"	1.8 " " " "	" "	2	5.1	"
"	4.6 " " " "	Allen Cr.	2	5.1	"
"	7.5 " " " "	Angelina Slough	1	4.1	"
"	7.7 " " " "	Angelina R. Relief	1	4.1	"
"	8.7 " " " "	Gibbons C. R. Relief	1	4.1	"

Highway No. 22.

75	5.4	Mi. E. of	Palestine	.....	Creek	2	4.2	Good
"	9.2	" " "	"	.....	Crystal Lake Branch ...	1	5.0	"
"	10.2	" " "	"	.....	.....	1	5.0	"
76	11.4	" " "	"	.....	Rices Branch	1	4.9	"
"	11.8	" " "	"	.....	.....	1	4.9	"
"	13.9	" " "	"	.....	.....	1	4.9	"
"	15.9	" " "	"	.....	Neches R.	1	6.0	"

Highway No. 24.

155	7.8	Mi. E. of	Jct. Hy. #40	.....	Spring Cr.	1	3.8	Poor
"	1.9	" " "	" " #14	.....	Mays Branch	1	7.0	Good
156	4.4	" " "	" " "	.....	Powler Cr.	1	6.8	"
"	1.2	" " "	McKinney	.....	E. Fork Trinity R.....	1	5.5	Fair
157	8.4	" " "	"	.....	Sister Grove Cr.	1	6.9	"
158	12.4	" " "	"	.....	Pilot Cr. Relief	1	5.4	Good
"	12.5	" " "	"	.....	" " "	1	5.4	"
159	12.8	" " "	"	.....	" " "	1	5.3	"
160	4.6	" " "	Farmersville	.....	Brushy Cr.	1	6.8	Fair

Survey No.	Location of Bridge	Name of Stream	1 or 2 Way	Safe Load (Tons)	Condition
	Highway No. 26.				
193	15.2 Mi. N. of Nacogdoches		2	5.3	Fair
"	14.2 " " " "		2	5.3	"
80	8.1 " " " "		2	4.0	Good
	Highway No. 27.				
171	2.0 Mi. W. of Cuero	Guadalupe R.	2	3.8	Good
	Highway No. 29.				
6	18.2 Mi. N. of N. C/L Cuero	Guadalupe R. Relief	2	5.0	Good
6	18.4 " " " " " "	" " " "	2	5.0	"
517	9.5 " " " " " Lockhart	Unknown	2	5.5	"
"	6.6 " " " " " Creedmoore	Boggy Cr.	2	4.6	Fair
	Highway No. 14.				
523	4.2 Mi. E. of E. C/L Hubbard	Unknown	1	4.8	Poor
524	5.0 " " " " " "	"	2	4.4	"
"	8.25 " " " " " "	Battle Cr. Relief	2	3.9	"
"	8.3 " " " " " "	" " " "	2	3.9	"

"	8.5	" " " " " "	.....	" " "	2	3.5	"
"	8.6	" " " " " "	.....	" " "	2	3.5	"
"	10.4	" " " " " "	.....	Unknown	2	2.7	"
"	13.1	" " " " " "	.....	"	2	3.5	"
525	16.7	" " " " " "	.....	"	2	4.8	"
"	21.8	" " " " " "	.....	"	1	4.0	"
407	0.4	" " " Winona	.....	"	2	6.0	Good

Highway No. 34.

53	3.3	Mi. E. of Britton	.....	Soak Cr.	1	5.4	Poor
"	4.2	" " " "	.....	Unknown	1	4.4	"
"	7.1	" " " "	.....	"	2	5.9	Good
"	2.7	" " " Midlothian	.....	Waxahachie Cr.	1	4.0	"
165	6.6	" W. " Terrell	.....	Egan Branch	1	7.0	"
164	5.0	" " " "	.....	Cartwright Cr.	1	5.7	"
"	2.3	" " " "	.....	Kings Cr. Relief	2	3.1	"
163	1.4	" E. " "	.....	" " "	1	5.5	"
"	7.1	" W. " Quinlan	.....	Mud Cr.	1	3.8	"
"	7.0	" " " "	.....	Mud Cr. Relief	1	3.8	"

Highway No. 35.

131	14.9	Mi. N. of Tenaha	.....	Hartage Cr. Slough	2	5.7	Good
"	15.8	" " " "	.....	Attoyac R.	2	5.5	"

Survey No.	Location of Bridge	Name of Stream	1 or 2 Way	Safe Load (Tons)	Condition
	Highway No. 35—(Continued).				
321	4.2 Mi. S. of Diboll	Neches R. Bottom	2	5.7	"
"	4.5 " " " "	" " "	2	5.7	"
"	4.6 " " " "	" " "	2	5.7	"
"	4.7 " " " "	" " "	2	5.7	"
"	4.8 " " " "	" " "	2	5.7	"
"	5.1 " " " "	" " "	2	5.7	"
"	5.2 " " " "	" " "	2	5.7	"
"	5.3 " " " "	Unknown	2	5.7	"
2	1.4 " S. " Alvin	Small Cr.	2	3.3	"
2	3.2 " " " "	Drainage Canal	2	3.2	Poor
2	8.0 " " " "	" "	1	6.1	Fair
2	8.5 " " " "	Chocolate Bayou	2	6.7	"
2	9.8 " " " "	Unknown	2	5.0	"
2	15.8 " " " "	"	2	4.5	"
2	17.3 " " " "	Flores Cr.	2	3.9	"
2	17.9 " " " "	Drain	2	6.7	"
2	18.7 " " " "	"	2	3.6	Good
2	20.5 " " " "	Small Bayou	2	4.7	Fair
2	22.0 " " " "	Drain	2	3.0	Good
2	2.4 " " " "	Oyster Cr.	2	6.3	"

109	55.1	Mi. N. of Giddings	.....	Little R. Relief	.....	2	5.3	Good
"	54.8	" " " "	.....	" " "	.....	2	5.3	"
"	54.4	" " " "	.....	" " "	.....	2	5.3	"
112	4.0	" S. of Milano	.....	Richardson Cr.	.....	1	3.5	Fair
"	5.3	" " " "	.....	Thompson Cr.	.....	1	3.8	"
113	5.8	" " " "	.....	Spring Cr.	.....	1	3.8	"
"	9.0	" " " "	.....	Black Hawk Cr.	.....	2	3.5	"
"	11.2	" " " "	.....	Davidson Slough	.....	1	3.1	Good
"	11.3	" " " "	.....	" Creek	.....	1	4.4	"
"	13.2	" " " "	.....	Copper Cr.	.....	1	4.4	"
114	18.3	" " " "	.....	First Davidson Cr.	.....	1	4.4	"
"	18.3	" " " "	.....	Harper Cr.	.....	1	4.4	"
"	19.1	" " " "	.....	Unknown	.....	1	4.4	"
"	19.5	" " " "	.....	"	.....	1	4.4	"
"	21.2	" " " "	.....	"	.....	1	4.4	"
"	22.4	" " " "	.....	Birds Cr.	.....	1	4.4	"
"	23.1	" " " "	.....	2nd Davidson Cr.	.....	1	3.5	"
"	23.7	" " " "	.....	Davidson Slough	.....	1	3.5	"
"	24.4	" " " "	.....	Sandy Cr.	.....	1	3.5	"
"	24.8	" " " "	.....	Oppermans Cr.	.....	1	3.5	"
"	27.2	" " " "	.....	Cappan Cr.	.....	1	3.5	"
"	32.0	" " " "	.....	Tye Plant	.....	1	3.5	"

Survey No.	Location of Bridge	Name of Stream	1 or 2 Way	Safe Load (Tons)	Condition
	Highway No. 37.				
406	2.5 Mi. S. of Mineola	Sabine R. Relief	2	6.4	Good
"	2.7 " " " "	" " "	2	6.4	"
"	3.2 " " " "	" " "	2	6.4	"
"	3.5 " " " "	" " "	2	6.4	"
	Highway No. 40.				
35	0.2 Mi. N. of S. C/L Gainesville	Elm Cr.	1	3.4	Poor
314	0.0 " " " " " "	" " Relief	1	4.2	"
37	4.0 " S. " Lewisville	Unknown	2	6.1	Good
37	4.1 " " " "	Benton Cr. Relief	2	6.1	"
37	4.2 " " " "	" " "	2	5.9	"
37	4.4 " " " "	" " "	2	6.1	"
37	2.7 " " " Carrolton	Elm Fork Trinity R.	1	3.5	"
37	2.6 " " " "	Elm Fork Trinity R. Relief	2	6.1	"
507	9.2 " S. of S. C/L Dallas	Hickory Cr.	2	5.1	"
"	9.5 " " " " " "	Unknown	2	6.5	"
"	10.3 " " " " " "	"	2	4.8	Fair

508	1.5	"	"	"	"	"	Seagoville	.....	"	.....	2	5.8	"
"	2.5	"	"	"	"	"	"	.....	E. Fork Trin. R.	Rel.	2	7.0	"
"	3.0	"	"	"	"	"	"	.....	" " " "	"	2	7.0	"
509	2.9	"	N.	of N.	C/L		Kaufman	.....	Brushy Cr.	.....	2	6.6	"
"	2.6	"	"	"	"	"	"	.....	" "	.....	2	6.6	"
"	1.75	"	"	"	"	"	"	.....	" "	.....	2	6.6	"
"	1.7	"	"	"	"	"	"	.....	" "	.....	2	6.6	"
510	2.0	"	S.	"	S.	"	"	.....	Unknown	.....	2	6.6	"
"	4.0	"	"	"	"	"	"	.....	Big Cottonwood Cr.	....	2	6.6	"
"	4.1	"	"	"	"	"	"	.....	" "	" Relf.	2	6.6	"
"	2.2	"	"	"	"	"	Jiba	.....	Lit. Cottonwood	"	2	6.6	"
"	2.3	"	"	"	"	"	"	.....	" "	" "	2	6.6	"
"	2.7	"	"	"	"	"	"	.....	Cottonwood Cr.	.....	2	6.6	"
"	0.1	"	N.	"	N.	"	Kemp	.....	Willow Cr.	.....	2	6.6	"
"	0.3	"	"	"	S.	"	"	.....	Kemp Branch	.....	2	6.6	"
"	2.4	"	S.	"	"	"	"	.....	Cedar Branch Relief	....	2	6.6	"
"	2.6	"	"	"	"	"	"	.....	" "	"	2	6.6	"
"	2.9	"	"	"	"	"	"	.....	" "	"	2	6.6	"
"	5.7	"	"	"	"	"	"	.....	Lacy Cr.	.....	2	6.6	"
"	5.9	"	"	"	"	"	"	.....	" "	Relief	2	6.6	"
"	6.0	"	"	"	"	"	"	.....	" "	"	2	6.6	"
"	6.3	"	"	"	"	"	"	.....	Lake Cr.	.....	2	6.6	"
"	7.5	"	"	"	"	"	"	.....	Cowakin Cr.	.....	2	6.6	"

Survey No.		Location of Bridge	Name of Stream	1 or 2 Way	Safe Load (Tons)	Condition
		Highway No. 45.				
86	12.5	Mi. W. of Palestine	Trinity R.	2	6.5	Good
"	12.2	" " " "	" " Slough	2	6.5	"
		Highway No. 44.				
110	60.7	Mi. N. of Giddings	Elm Cr.	2	5.3	Good
109	52.2	" " " "	Sandy Cr.	2	3.5	Poor
"	51.5	" " " "	" " Relief	2	3.5	"
"	49.2	" " " "	Copper Hollow	1	4.9	Good
108	28.9	" " " "	Allene Cr.	1	4.4	"
108	15.1	" " " "	Middle Yeguea	1	2.8	Poor
107	4.1	" " " "	Unknown	1	3.5	Good
107	3.4	" " " "	Draw	1	3.5	"
106	2.7	" " " "	Naile Cr.	1	3.5	"
367	12.8	" " " "	Unknown	1	3.5	Fair
		Highway No. 49.				
411	20.7	Mi. N. of Mt. Pleasant	Trent Lake	2	4.9	Good

"	20.2	" " " " "	.....	Sulphur R.	2 6.0 "
"	19.8	" " " " "	.....	Unknown	2 6.0 "
"	19.6	" " " " "	.....	"	2 6.0 "
"	16.9	" " " " "	.....	"	2 6.0 "
"	13.4	" " " " "	.....	"	2 6.0 "
"	11.2	" " " " "	.....	White Oak Cr.	2 6.0 "
"	11.1	" " " " "	.....	" " " Rlf.	2 6.3 "
"	10.5	" " " " "	.....	Slough	2 6.3 "
"	8.7	" " " " "	.....	Piney Cr. Relief	2 6.0 "
"	8.6	" " " " "	.....	" " "	2 6.0 "
"	8.5	" " " " "	.....	" " "	2 6.0 "

Highway No. 64.

43	10.1	Mi. W. of Tyler	.....	Neches R. Slough	2	5.5 Good
227	6.9	" E. " Carthage	.....	Sabine R.	1	5.0 Fair

Highway No. 65.

409	3.0	Mi. N. of Gilmer	.....	Little Cypress Cr.	2	6.8 Good
"	5.3	" " " "	.....	Lilly Cr.	2	6.8 "
"	5.4	" " " "	.....	" " Rlf.	2	6.8 "

Survey No.	Location of Bridge	Name of Stream	1 or 2 Way	Safe Load (Tons)	Condition
	Highway No. 66.				
385	17.7 Mi. S. of Blanco	Guadalupe R.	2	3.2	Good
383	12.9 " " " Hamilton	Unknown	2	4.5	"
"	10.8 " " " "	"	2	4.5	"
382	3.7 " " " "	Little Cowhouse Cr.	2	4.5	"
"	19.6 " " " Hico	Unknown	2	4.5	"
"	17.1 " " " "	Couch Cr.	2	4.5	"
"	13.9 " " " "	" "	2	4.5	"
"	4.3 " " " "	Unknown	2	4.5	"
"	2.5 " " " "	"	2	4.5	"
381	0.3 " " " "	Bosque R.	2	2.8	Poor
	Highway No. 67.				
202	0.1 Mi. E. of Iredell	Bosque R.	2	3.1	Poor
37	15.5 " " " "	" "	1	3.7	Good
203	11.7 " " " Meridian	" "	2	3.7	Poor
	Highway No. 68.				
378	11.2 Mi. W. of Cleburne	Brazos R.	1	6.0	Fair
"	11.1 " " " "	" "	1	6.0	"

377	10.1	" " " "	.....	Kennard Branch	1	4.8	Good
"	8.4	" " " "	.....	Bono Cr.	1	5.4	"
96	7.3	" N. of Midlothian	.....	Unknown	2	6.0	"
97	13.1	" " " "	.....	Ten Mile Cr.	1	6.9	"
			Highway No. 90.				
302	5.3	Mi. E. of Navasota	.....	Holland Cr.	2	5.8	Good
			Highway No. 94.				
364	15.2	Mi. S. of Groveton	.....	Unknown	2	6.3	Poor
"	15.0	" " " "	.....	White Oak Bottom	2	6.3	"
363	6.6	" " " "	.....	Slough	2	6.3	"
"	6.6	" " " "	.....	Sandy Cr.	2	6.3	"
"	6.2	" " " "	.....	Caney Cr.	2	6.3	"
363	6.1	Mi. S. of Groveton	.....	Caney Slough	2	6.3	Poor
"	3.2	" N. " "	.....	" "	2	6.3	"
"	3.25	" " " "	.....	" "	2	6.3	"
"	3.3	" " " "	.....	" "	2	6.3	"
362	13.0	" S. " Lufkin	.....	Neches R. Slough	2	6.3	Poor
"	12.9	" " " "	.....	" " "	2	6.3	"
"	12.8	" " " "	.....	" " "	2	6.3	"
"	12.7	" " " "	.....	" " "	2	6.3	"

Survey No.		Location of Bridge	Name of Stream	1 or 2 Way	Safe Load (Tons)	Condition
		Highway No. 94—(Continued).				
"	12.6	" " " "	" " "	2	6.3	"
"	12.4	" " " "	" " "	2	6.3	"
"	12.3	" " " "	" " "	2	6.3	"
"	12.0	" " " "	" " "	2	6.3	"
"	10.9	" " " "	" " Bottom	2	6.3	"
"	10.8	" " " "	" " "	2	6.3	"
"	10.7	" " " "	" " "	2	6.3	"
"	10.7	" " " "	" " "	2	6.3	"
"	10.3	" " " "	" " "	2	4.8	"
"	9.6	" " " "	Unknown	1	3.4	"
		Highway No. 105.				
16	1.1	Mi. E. of Conroe	Alligator Bayou	2	5.2	Fair
17	3.9	" " " "	Four Mile Cr.	2	5.9	"
"	6.2	" " " "	Brushy Cr.	2	5.2	"
"	6.2	" " " "	Unknown	2	5.9	"
"	6.6	" " " "	Possum Cr.	1	5.6	"
"	11.4	" " " "	Unknown	2	6.1	"
18	17.0	" " " "	Dry Gulley	2	4.8	"
"	3.1	" " " Fostoria	Draw	1	5.6	"

Highway No. 106.

511	9.3 Mi. W. of W. C/L Groveton	Brownlee Bottom	2	6.7	Good
"	9.2 " " " " " "	" Creek	2	6.7	"
"	8.4 " " " " " "	Louisville Cr.	2	6.7	"
"	8.3 " " " " " "	Copper Cr.	2	6.7	"

Highway No. 128.

448	19.2 Mi. N. of Refugio	San Antonio R.	2	4.5	Good

Highway No. 135.

196	9.3 Mi. N. of Kilgore	Prairie Cr.	2	6.4	Good
"	7.7 " " " "	Caney Cr.	2	5.3	"
"	7.6 " " " "	Creek	2	5.3	"
195	5.1 " " " "	Peavine Branch	2	5.3	"
"	2.1 " " " "	Caney Cr.	2	5.3	"
"	1.4 " " " "	Rabbit Cr.	2	6.9	Fair

Highway No. 139.

306	5.8 Mi. W. of Marlin	Brazos R.	2	6.3	Fair
"	7.1 " " " "	Unknown	2	4.2	"

Survey No.	Location of Bridge	Name of Stream	1 or 2 Way	Safe Load (Tons)	Condition
	Highway No. 144.				
380	0.5 Mi. S. Glen Rose	Unknown	1	4.7	Good
"	2.6 " " " "	"	1	4.8	"
"	5.1 " " " "	"	2	4.6	"
"	8.1 " " " "	Hill Cr.	2	4.6	"
	Highway No. 150.				
180	0.8 Mi. E. of New Waverly	Unknown	1	5.5	Poor
"	1.0 " " " " "	"	1	4.4	"
"	1.6 " " " " "	"	1	4.4	"
"	2.0 " " " " "	"	1	4.4	"
"	2.2 " " " " "	"	1	4.4	"
"	2.4 " " " " "	"	1	4.4	"
181	3.8 " " " " "	"	1	3.6	"
"	4.3 " " " " "	"	1	4.4	"
494	5.3 " " " " "	"	2	5.2	Good
390	5.6 " " " " "	"	2	5.2	"
"	12.2 " " " " "	Winters Bayou	2	5.6	"
493	13.1 " " " " "	Pumpkin Cr.	2	6.4	"

182	1.4	"	"	"	"	"	.....	Miller Cr.	2	5.0	Poor
182	3.0	"	"	"	"	"	.....	San Jacinto R.	2	5.0	"
"	4.1	"	"	"	"	"	.....	Reese Branch	2	5.0	"

Highway No. 174.

380	3.6	Mi. W. of Jct. Hwy. #144	Bosque R.	1	4.4	Good

Highway No. 195.

520	6.0	Mi. E. of Jct. #67	.....	2	5.5	Good

EXHIBIT 4A.

Docket No. 864. Witness: Knapp.

Statement Showing Partial List of Highway Bridges Having a Safe Loading Capacity of Less Than Seven Tons, Which Are Located Upon Routes Proposed in the Application of A. E. McDonald.

Note:—The following list of bridges shows their safe loading capacity in terms of their condition when new No deduction has been made for physical depreciation as described under "condition."

Survey No.	Hwy. No.	Location of Bridge	Name of Stream	1 or 2 Way	Safe Load (Tons)	Condition
		State Line (Denison)—Galveston Via Hys. 6-2-6.				
535	6	0.3 Mi. S. of Forrest Av.—Dallas	N. App. Trinity R.	2	3.7	Poor
"	6	" " " " "	S. " " "	2	3.7	Fair
"	6	1.1 " " " " " "	Trinity R.—Relief	2	3.9	Good
541	6	4.8 Mi. N. of Bremond	Unknown	2	3.4	Fair
121	6	4.5 " " " "	"	2	3.5	"
"	6	4.4 " " " "	"	2	3.5	"
"	6	4.3 " " " "	"	2	3.5	"

"	6	4.2	"	"	"	"	"	"	2	3.5	"
"	6	4.1	"	"	"	"	"	"	2	3.5	"
541	6	2.9	"	"	"	"	"	"	2	3.4	"
305	6	1.7	"	"	"	"	Small Branch		2	3.0	"
542	6	0.3	"	"	"	"	Unknown		2	2.0	"
120	6	8.2	"	"	"	Calvert	Barton Branch		1	3.5	"
542	6	6.3	"	"	"	"	Unknown		1	4.5	Poor
119	6	3.8	"	"	"	"	Walnut Cr.		2	3.5	Good
543	6	1.9	"	"	"	"	Unknown		2	3.7	"
119	6	0.4	"	"	"	Hearne	Sandy Cr.		2	3.5	"
543	6	0.1	"	"	"	"	Unknown		2	3.7	"

State Line (Gainesville)—Houston Via Hys. 40-10-34-14-32-19.

35	40	0.2	Mi. N. of S. C/L—Gainesville				Elm Cr.		1	3.4	Poor
314	40	0.0	"	"	"	"	"	"	1	4.2	"
53	34	3.3	" E.	"	Britton		Soar Cr.		1	5.4	"
"	34	4.2	"	"	"	"	Unknown		1	4.4	"
"	34	7.1	"	"	"	"	"		2	5.9	Good
"	34	2.7	"	"	"	Midlothian	Waxahachie Cr.		1	4.0	"
300	19	29.8	"	"	"	N. C/L Houston	San Jacinto R.		2	6.2	"
"	19	29.9	"	"	"	"	"	"	2	6.2	"
"	19	30.6	"	"	"	"	"	"	2	6.2	"

EXHIBIT No. 5.

Docket No. 864. Witness: Knapp.

Number of Motor Passenger Cars and Trucks in Texas 1915 to 1934 Inclusive.

All statistics for United States are from "Facts and Figures of N. A. C. of C. 1935," pages 18-20. Texas classifications shown for years 1924 to 1934 incl. are as per records of Texas State Highway Department. For the years 1917 to 1923 incl. the total number of unclassified motor vehicles for Texas are as shown by the records of Texas State Highway Department. Years 1915 and 1916 are as shown in Statistical Abstract of the U. S. (1922), page 291.

	United States				Texas				
Year	Number of Pass. Cars	Number of Trucks	Total Number of Vehicles	Trucks % of Tot. Vehicles	Number of Pass. Cars	Number of Trucks	Total Number of Vehicles	Trucks % of Tot. Vehicles	Compar.* Truck Density
1915	2,309,666	136,000	2,445,666	5.5	39,504	496	40,000	1.2	22%
1916	3,297,996	215,000	3,512,996	6.1	122,725	2,275	125,000	1.8	30%
1917	4,657,340	326,000	4,983,340	6.5	190,442	4,278	194,720	2.2	34%
1918	5,621,617	525,000	6,146,617	8.5	239,617	10,584	250,201	4.2	50%
1919	6,771,074	794,372	7,565,446	10.5	311,420	20,301	331,721	6.1	58%
1920	8,225,859	1,006,082	9,231,941	10.9	402,359	28,018	430,377	6.5	60%
1921	9,346,195	1,118,520	10,464,715	10.7	440,505	30,070	470,575	6.4	60%

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1922	10,864,128	1,375,725	12,239,853	11.1	495,565	36,043	531,608	6.8	61%
1923	13,479,608	1,612,569	15,092,177	10.7	651,429	44,393	695,822	6.4	60%
1924	15,460,649	2,134,724	17,595,373	12.1	766,149	65.536	840,559	7.8	64%
1925	17,512,638	2,441,709	19,954,347	12.2	882,994	88,207	983,420	9.0	74%
1926	19,237,171	2,764,222	22,001,393	12.6	941,791	104,794	1,060,716	9.9	79%
1927	20,219,224	2,914,019	23,133,243	12.6	995,366	114,874	1,126,982	9.8	78%
1928	21,379,125	3,113,999	24,493,124	12.7	1,058,695	153,902	1,235,162	12.5	98%
1929	23,121,589	3,379,854	26,501,443	12.7	1,162,067	180,062	1,342,129	13.4	105%
1930	23,059,262	3,486,019	26,545,281	13.1	1,199,940	206,574	1,406,514	14.7	112%
1931	22,366,313	3,466,571	25,832,884	13.4	1,095,270	207,635	1,302,905	15.9	118%
1932	20,885,814	3,229,315	24,115,129	13.4	996,191	189,051	1,185,242	16.0	119%
1933	20,616,234	3,227,357	23,843,591	13.5	978,431	181,758	1,160,189	15.7	116%
1934	21,524,068	3,409,335	24,933,403	13.7	1,064,529	220,180	1,284,709	17.3	126%

*Truck Density as herein used is the ratio of Texas Trucks percent of total vehicles in Texas to the U. S. Trucks percent of total vehicles in the U. S.

EXHIBIT No. 6.

Docket No. 864. Witness: Knapp.

Texas Motor Vehicle Registrations, by Classes, for Years 1917 to 1935, Inclusive.

As Shown by Records of State Highway Dept. of Texas

Year	Passenger Cars	Trucks	Motor Busses	Motor Cycles	Side Cars	Tractors	Trailers	Total
1917	190,442	4,278						194,720
1918	239,617	10,584						250,201
1919	311,420	20,301	No record kept for years					331,721
1920	402,359	28,8018	1917 to 1923					430,377
1921	440,505	30,070						470,575
1922	495,565	36,043						531,608
1923	651,429	44,393						695,822
1924	766,149	65,536	3,764	2,738	....	122	2,250	840,559
1925	882,994	88,207	4,241	2,780	....	592	4,606	983,420
1926	941,791	104,794	4,158	2,688	....	359	6,931	1,060,716
1927	995,366	114,874	3,260	3,103	....	460	9,919	1,126,982
1928	1,058,695	153,902	5,850	3,507	....	1,079	12,129	1,235,162

1929	1,162,067	180,062	4,938	4,037	....	533	14,826	1,366,463
1930	1,199,940	206,574	1,953	4,093	587	495	29,470	1,443,112
1931	1,095,270	207,635	1,445	3,860	604	540	30,457	1,339,811
1932	996,191	189,051	904	3,299	488	237	36,167	1,226,337
1933	978,431	181,758	645	3,212	389	138	36,293	1,200,866
1934	1,064,529	220,180	715	3,427	321	108	35,803	1,325,083
1935	1,105,806	246,738	775	3,407	243	114	37,397	1,394,480

Statement Showing Relative Registrations of Passenger Cars and Trucks in Texas for Years 1925 to 1935 Inclusive

	Passenger Cars Per Cent of 1925 Registrations		Trucks Per Cent of 1925 Registrations	
	Number	Per Cent	Number	Per Cent
1925	882,994	100%	88,207	100%
1926	941,791	107%	104,794	119%
1927	995,366	113%	114,874	130%
1928	1,058,695	120%	153,902	174%
1929	1,162,067	132%	180,062	204%
1930	1,199,940	136%	206,574	234%
1931	1,095,270	124%	207,635	235%
1932	996,191	113%	189,051	214%
1933	978,431	111%	181,758	206%
1934	1,064,529	121%	220,180	250%
1935	1,105,806	125%	246,738	280%

Docket No. 864.

EXHIBIT No. 7.

Witness: Knapp.

Statement Showing Annual Mileage, Tonnage and Vehicle Statistics of Common, Contract and Special Commodity Motor Carriers Operating Under Authority of the Texas Railroad Commission, Being as Shown by the Annual Reports of the Motor Transport Division for the Years 1932-'33-'34-'35.

Note: Returns for Year 1935 are incomplete.

	1932	1933	1934	1935
Average number of trucks operated	1,545	1,524	1,936	2,033
Total tons of freight transported	465,161	521,537	885,536	881,187
Total truck miles operated	33,991,443	38,260,127	59,926,986	63,158,644
Average tons per truck	301	342	457	433
Average miles per truck	22,001	25,105	30,954	31,067
Total number of trucks authorized	3,075	3,083	2,567	3,404
Tons of freight possible of being moved in trucks authorized, based upon average load of truck operated	925,575	1,054,386	1,173,119	1,473,932
Potential tonnage per cent of 1932	100%	114%	127%	159%
Truck miles possible in trucks authorized, based upon average distance run by truck operated	67,653,075	77,398,715	79,458,918	105,752,068
Potential truck mileage per cent of 1932	100%	114%	117%	156%

94 EXHIBIT No. 8.

Docket No. 864. Witness: Knapp.

Statement Showing Comparison of Population and the Number of Motor Vehicle Registrations for Entire State of Texas with Counties Traversed by the Highways Specified in the Application of A. E. McDonald.

Note: Population is as shown by U. S. Census of 1930. Motor Vehicle Registrations are as shown by records of Texas State Highway Department for fiscal year ending August 31st, 1935.

	No. of Counties	Population	No. of M. V. Regis.
Entire State	254	5,824,715	1,408,875
Routes Applied for Total	34	2,221,368	576,815
Percent of Entire State	13.4	36.1	40.9

Details of Population and Motor Vehicle Registration in Counties Traversed by Routes Applied for.

Name of County	Population	Motor Vehicle Registration
Grayson	65,483	14,458
Collin	46,180	9,682
Dallas	325,691	97,935
Ellis	53,936	10,693
Hill	43,036	8,625
McLennan	98,682	24,478
Falls	38,771	6,561
Robertson	27,240	3,278
Brazos	21,835	5,396
Grimes	22,642	3,261
Waller	10,014	2,671
Harris	369,328	112,773
Galveston	64,401	16,280
Cooke	24,136	6,350

Name of County	Population	Motor Vehicle Registration
Denton	32,822	7,783
Tarrant	197,553	57,621
Navarro	60,507	9,439
Freestone	22,589	3,278
Leon	19,898	2,005
Madison	12,227	1,961
Walker	18,528	2,811
Montgomery	14,588	4,477
Bell	50,030	11,748
Williamson	44,146	11,052
Travis	77,777	21,966
Hays	14,915	4,144
Comal	11,984	4,369
Guadalupe	28,925	6,376
Bexar	292,533	78,323
Atascosa	15,654	3,155
Live Oak	8,956	1,945
Jim Wells	13,456	2,951
Brooks	5,901	1,001
Hidalgo	77,004	17,979
Totals	2,221,368	576,615

95 5. The Court erred in its finding as a fact, as set out in Paragraph 5 in the original findings of fact on file herein, that for a long time prior to June 1, 1935, and at all times since June 1, 1935, complainant has been continuously in bona fide operation engaged in the business of transporting property for hire over the highways of the State of Texas and Oklahoma exclusively in interstate commerce.

6. The Court erred in its finding as a fact, as set out in Paragraph 8 of the original findings of fact on file herein, that complainant filed an application with the Interstate Commerce Commission for an interstate certificate within the time fixed by the

Federal Motor Carrier Act, 1935, or within the time required by the Interstate Commerce Commission of the United States under appropriate orders of said Interstate Commerce Commission extending the effective date of Section 206 thereof consistent with the terms of said Act.

7. The Court erred in its finding as a fact, as set out in Paragraph 12 of the Original Findings of Fact on file herein, that all of complainant's said trucks in all respects comply with all police requirements under the applicable laws of the State of Texas.

96 8. The Court erred in concluding as a matter of law, as set out in Paragraph 1 of the Conclusions of Law on file herein, that it had jurisdiction of the parties and subject matter of this cause, and that the complainant has pleaded and proved jurisdiction and equity.

9. The Court erred in concluding as a matter of law, as set out in Paragraph 2 of the Conclusions of law on file herein, that what is known as the Motor Carrier Act, 1935, passed by the 74th Congress (Senate Bill 1629) became effective on August 9, 1935, except as to Section 227 thereof except to the power of the Interstate Commerce Commission to postpone the taking effect of any provision of the Act (other than Section 227) until such time after October 1, 1935, as the Commission shall prescribe, but not later than April 1, 1936; that said Act supersedes the Texas Motor Truck Laws (Acts 42nd Legislature, 1931, page 480, Chapter 277) in so far as said Texas Act gave to the Railroad Commission of Texas power to forbid the use of Federal Highways Nos. 75, 77, 80, 81, 290, 90, and 281 by complainant's trucks when engaged exclusively in the transportation of property in interstate commerce.

10. The Court erred in concluding as a matter of law, as set out in Paragraph 3 of the Conclusions of Law on file herein, that the phrase "if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935" as used in Section 206 of the Motor Carrier Act, 1935 (Senate Bill 1629), properly construed relates to the actual physical continuous and regular operation of such carrier on June 1, 1935, and continuously ever since.

97 11. The Court erred in concluding as a matter of law, as set out in Paragraph 4 of the Conclusions of Law on file herein, that complainant was in bona fide operation on and prior to June 1, 1935, and has been continuously in such operation since said date.

12. The Court erred in concluding as a matter of law, as set out in Paragraph 5 of the Conclusions of Law on file herein, that complainant has complied with all applicable police requirements of the State of Texas.

13. The Court erred in concluding as a matter of la , as set out in Paragraph 6 of the Conclusions of La on file herein, that complainant is entitled to a permanent injunction against the Railroad Commission of Texas and individual members composing said Railroad Commission of Texas; Mark Marshall, the acting director of the Motor Transportation Division of the Railroad Commission of Texas; Walton D. Hood, W. B. Renfro, and Tom Miller, inspectors and law enforcement officers of the Railroad Commission of Texas together with all of their agents, representatives, and employees, enjoining and restraining respondents and each of them, their agents, employees, and representatives from molesting or in any way interfering with complainant's operation within the State of

Texas in interstate transportation of property by motor truck for hire.

14. The Court erred in entering the final decree herein granting to complainant a permanent injunction against respondents.

98 Prayer.

Wherefore the respondents, Ernest O. Thompson, C. V. Terrell, and Lon A. Smith, each individually, the Railroad Commission of Texas, Walton D. Hood, W. B. Renfro, and Tom Miller, and each of them, pray that said final decree aforesaid entered on July 16, 1936, as amended by order made and entered on the 13 day of October, A. D. 1936, be reversed, and that the order granting permanent injunction be directed to be set aside.

WILLIAM McCRAW,
Attorney General of Texas,
CURTIS E. HILL,
Assistant Attorney General,
Attorneys for Respondents.

ORDER ALLOWING APPEAL AND FIXING BOND.

99 Filed Oct. 13, 1936.

(Title Omitted.)

Ernest O. Thompson, C. V. Terrell, and Lon A. Smith, each individually, the Railroad Commission of Texas, Walton D. Hood, W. B. Renfro, and Tom Miller, respondents in the above entitled and numbered cause, having filed herein a petition for an appeal from the final decree of this Court made and entered

on the 16th day of July, A. D. 1936, as amended by order made and entered on October 13, A. D. 1936, the Court is of the opinion that said petition should be granted.

It is therefore Ordered, Adjudged and Decreed by the Court that an appeal by respondents to the United States Circuit Court of Appeals for the Fifth Circuit from the final decree of this Court heretofore entered herein on the 16th day of July, A. D. 1936, as amended by order made and entered on October 13, A. D. 1936, be, and the same hereby is allowed, and that a certified transcript of the record be forwarded to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana.

It is Further Ordered that the appellants furnish a bond on appeal in the amount of Five Hundred ($500.00) Dollars, conditioned as required by law, the same to operate as a cost bond only.

100 This the 13 day of October, A. D. 1936.

JAMES C. WILSON,
United States District Judge.

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101 WAIVER OF CITATION ON APPEAL.

Filed Oct. 13, 1936.

(Title Omitted.)

Ernest O. Thompson, C. V. Terrell, and Lon A. Smith, each individually, the Railroad Commission of Texas, Walton D. Hood, W. B. Renfro, and Tom Miller, having filed their assignment of errors and petition for an appeal, and having been allowed an appeal to review the final decree of the Court granting a per-

manent injunction entered on July 16th, 1936, as amended by order made and entered on October 13, A. D. 1936, A. E. McDonald, by his attorneys of record, hereby waives the issuance of citation on appeal, and agrees to enter his appearance in the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, within thirty days from the allowance of such appeal.

A. E. McDONALD,
By T. S. CHRISTOPHER,
PRICE & CHRISTOPHER,
WM. E. DAHL,
Attorneys of Record for A. E. McDonald.

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102 APPEAL BOND.

Filed Oct. 13, 1936.

(Title Omitted.)

Know all Men by these Presents:

That we, Ernest O. Thompson, C. V. Terrell, and Lon A. Smith, each individually, the Railroad Commission of Texas, Walton D. Hood, W. B. Renfro, and Tom Miller, as principals, and Continental Casualty Company of Chicago, Illinois, a body corporate, as surety, are held and firmly bound unto A. E. McDonald in the sum of $500.00, to which payment well and truly to be made, we bind ourselves jointly and severally, our heirs, executors, administrators, successors, and assigns, respectively, firmly by these presents, conditioned as follows:

Whereas, the respondents, Ernest O. Thompson, C. V. Terrell, and Lon A. Smith, each individually, the Railroad Commission of Texas, Walton D. Hood, W. B. Renfro, and Tom Miller, have prosecuted their appeal to the United States Circuit Court of Appeals for the Fifth Circuit to reverse the final decree entered in said cause by the United States District Court for

the Northern District of Texas, Fort Worth Division, on the 16th day of July, A. D. 1936, as amended by order made and entered on October 13, A. D. 1936, in the above entitled and numbered cause, whereby the Court granted a permanent injunction against said respondents.

103 "Now, Therefore, the condition of the above obligation is such that if the above named respondents, Ernest O. Thompson, C. V. Terrell, and Lon A. Smith, each individually, the Railroad Commission of Texas, Walton D. Hood, W. B. Renfro, and Tom Miller, shall prosecute their appeal to effect and answer all costs if they fail to make good their plea, then this obligation is to be void, otherwise to remain in full force and effect.

Witness our hands, this 13 day of October, A. D. 1936.

ERNEST O. THOMPSON,
C. V. TERRELL,
LON A. SMITH,
THE RAILROAD COMMISSION OF TEXAS,
(Composed of Ernest O. Thompson, C. V. Terrell, and Lon A. Smith),
WALTON D. HOOD,
W. B. RENFRO,
TOM MILLER,
By CURTIS E. HILL,
Attorney of Record,
Principals,
CONTINENTAL CASUALTY COMPANY OF CHICAGO, ILLINOIS, Surety,
By ETHEL L. ROEDER. (Seal)

O. K. as to surety.

....., Clerk,
By ....., Deputy Clerk.

The above bond examined and approved this the 13 day of October, A. D. 1936.

JAMES C. WILSON,
United States District Judge.

STATEMENT OF EVIDENCE UNDER EQUITY RULE 75.

104 Filed October 31, 1936.

(Title Omitted.)

The following is the statement of the evidence, in narrative form, produced upon the trial of the above entitled and numbered cause deemed by the appellants necessary for the consideration of the errors assigned.

WILLIAM McCRAW,
Attorney General of Texas,
CURTIS E. HILL,
Assistant Attorney General,
Attorneys for Appellants.
ERNEST O. THOMPSON,
C. V. TERRELL, and
LON A. SMITH,
Each individually, the Railroad Commission of Texas, Walton D. Hood, W. D. Renfro, and Tom Miller.

105 STATEMENT OF EVIDENCE UNDER EQUITY RULE 75.

In the District Court of the United States for the Northern District of Texas, Fort Worth Division.

A. E. McDonald, Complainant,
vs. No. 864 In Equity.
Ernest O. Thompson, et al., Respondents.

Be It Remembered, that the following is a true, full and correct statement, in narrative form, of all of the evidence adduced, and proceedings had upon the trial of the above entitled and numbered cause before the Honorable James C. Wilson, United States District Judge, for the Northern District of Texas, which relates to the matter and questions on appeal herein, except certain original exhibits to be forwarded to the Court.

Appearances:

T. S. Christopher, Lloyd E. Price and William E. Dahl, Fort Worth, Texas, appearing for the complainant.

William McCraw, Attorney General of Texas, and Curtis E. Hill, Assistant Attorney General, appearing for the respondents:

Complainant's Case.

A. E. McDONALD, complainant and witness for Complainant (Affidavit):

My name is A. E. McDonald. I am a resident of the City of Waxahachie, Ellis County, Texas, and have there resided for the past 22 years. For the

past three and one-half years, on each and every day, I have regularly, continuously, legally, lawfully, and in good faith, operated trucks, exclusively in interstate commerce, over the highways of the State of Texas for hire.

106 At all times I have caused such trucks so used by me to meet all police requirements of the State of Texas, with reference to the manner of operation, the height, length and width thereof, braking and lighting equipment, and any and all other rules and regulations with reference to the manner of operation and physical requirements of such trucks. I have kept said trucks at all times properly licensed with the State Highway Department to operate over the highways of the State of Texas.

The Railroad Commission of Texas denied me a certificate to operate exclusively in interstate commerce but I honestly and in good faith, believing that I was entitled to such certificate, appealed from such order of the Railroad Commission to the 126th District Court of Travis County, Texas, where judgment was on November 14, 1934, rendered and entered, setting aside such order of the Railroad Commission, declaring same null and void and permanently enjoining the respondents, and each of them, together with their agents, servants and representatives from in any way interfering with or molesting me in the operation of my trucks over the highways of the State of Texas in interstate commerce, and I continued my operation until January 15th, 1936, when the Court of Civil Appeals, Third Supreme Judicial District, dissolved the said injunction.

At all times during such motor carrier operation I kept continuously in force and on file with the Railroad Commission of Texas and the Corporation Commission of Oklahoma public liability and property damage insurance covering my trucks and motor equipment.

I now in good faith honestly believe that under the terms of the Motor Carrier Act, 1935, I am entitled to a certificate of convenience and necessity from the Interstate Commerce Commission authorizing me to continue my operations exclusively in interstate commerce over the highways of the State of Texas; and at this time I have almost completed my application to the Interstate Commerce Commission for such certificate of convenience and necessity and same will be completed and filed before February 12th, 1936, before my "Grandfather Rights" are extinguished by lapse of time. I have met all requirements of the Motor Carrier Act, 1935, and all applicable rules and regulations of the Interstate Commerce Commission, and will at all times in the future comply with the requirements of said Act, and said rules and regulations. On the 15th day of January, A. D. 1936; I was ordered by Walton D. Hood, Chief Law Enforcement Officer of the Railroad Commission to cease my motor carrier operations over the highways of Texas, and he circulated instructions to all law enforcement officers in Texas to stop my trucks and arrest, file complaints against, and prosecute my drivers. On January 16th, 1936, one of my trucks laden with property moving over the public highways exclusively in interstate commerce was stopped and detained by two of the Railroad Commission Inspectors until this Honorable Court issued the restraining order in this case, such detention lasting about two or three days. My motor transportation operation for hire has consisted in the moving from ship side at Port Houston, Texas of commodities originating in other states or foreign countries destined for points in Texas or Oklahoma; in moving to ship side at Port Houston, Texas, commodities originating in Texas or Oklahoma and destined for other states and foreign countries, or in moving commodities between Texas and Oklahoma. I now am, and have been, authorized by the Corporation Commission of Okla-

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homa under two permits to operate over the public highways of that state as an interstate motor carrier for hire.

The value of my rights to operate over the highways of Texas and Oklahoma as an interstate carrier for hire; the value of my "Grandfather Rights" secured to me by my past operations, and the Motor Carrier Act, 1935; and the value of my equipment is from Ten Thousand ($10,000) Dollars to Fifty Thousand ($50,000) Dollars.

"During the past four or five years, I have operated my trucks almost two million miles over the
108 highways described in my Bill of Complaint on file herein; I find that such highways are not congested; I have had no accident in which any person was killed or injured, nor have I had difficulty in operating over such highways with safety for the traveling public.

JOHN SHAW, witness for complainant (Affidavit):

My name is John Shaw. I have lived in Waxahachie, Texas, for thirty-four years, and since 1932 I have been employed by A. E. McDonald, in connection with the operation of his interstate truck line for compensation and hire. For the last three and one-half years I have driven trucks for A. E. McDonald and I know that during said time Mr. McDonald has continuously operated exclusively in interstate commerce over the highways of Texas.

I am familiar with the requirements of the laws of the State of Texas as to the height, width, length, lighting and braking equipment, and licensing of trucks and equipment, and all trucks and equipment used by A. E. McDonald have met all such requirements.

In driving A. E. McDonald's trucks, I always kept within the speed limit prescribed by law and operated same safely and carefully with due regard to the rights

of other motor vehicle operators on the highways. I am familiar with the physical and mechanical condition of Mr. McDonald's trucks and same are in such condition physically and mechanically that they may be safely operated over the highways of Texas.

On January 16th, 1936, I was driving one of A. E. McDonald's trucks laden with coffee received at ship side at Port Houston, Texas, destined for Dallas, Texas, over State Highway No. 75, and I was stopped and arrested, and said truck detained by two of the Railroad Commission Inspectors at Conroe, Texas. Complaint was filed against me and bond required which bond I made and was released. The two Railroad Commission Inspectors then told me that I could not carry my cargo on but that I might unload same and drive the truck on. I then, as I was com-
109 pelled to do, left the truck and its cargo in Conroe and returned to my home at Waxahachie, Texas. I could not and did not move such truck and its cargo to Dallas until January 20, 1936, after the Court issued its restraining order in this case.

JIM TATE, witness for Complainant (Affidavit):

My name is Jim Tate. I have lived in Waxahachie, Texas, since 1920, and since 1928 I have been employed by A. E. McDonald, in connection with the operation of his interstate truck line for hire. For the last three and one-half years I have driven trucks for A. E. McDonald and I know that during said time Mr. McDonald has continuously operated exclusively in interstate commerce over the highways of Texas.

I am familiar with the requirements of the laws of the State of Texas as to the height, width, length, lighting and braking equipment, and licensing of trucks and equipment, and all trucks and equipment used by A. E. McDonald have met all such requirements.

In driving A. E. McDonald's trucks, I always kept within the speed limit prescribed by law and operated same safely and carefully with due regard to the rights of other motor vehicle operators on the highways. I am familiar with the physical and mechanical condition of Mr. McDonald's trucks and same are in such condition physically and mechanically that they may be safely operated over the highways of Texas.

ED REEVES, witness for complainant (Affidavit):

My name is Ed Reeves. I have lived in Waxahachie, Texas, since 1922, and since 1931 I have been employed by A. E. McDonald, in connection with the operation of his interstate truck line for hire. For the last four years I have driven trucks for A. E. McDonald, and I know that during said time Mr. McDonald has continuously operated exclusively in interstate commerce over the highways of the State of Texas.

110 I am familiar with the requirements of the laws of the State of Texas as to the height, width, length, lighting and braking equipment, and licensing of trucks and equipment, and all trucks and equipment used by A. E. McDonald have met all such requirements.

In driving A. E. McDonald's trucks, I always kept within the speed limit prescribed by law and operated same safely and carefully with due regard to the rights of other motor vehicle operators on the highways. I am familiar with the physical and mechanical condition of Mr. McDonald's trucks and same are in such condition physically and mechanically that they may be safely operated over the highways of Texas.

RAY KING, witness for Complainant (Affidavit):

My name is Ray King. I have lived in Waxahachie, Texas, since 1922, and since 1933 I have been em-

ployed by A. E. McDonald, in connection with the operation of his interstate truck line for hire. For the last three years I have driven trucks for A. E. McDonald and I know that during said time Mr. McDonald has continuously operated exclusively in interstate commerce over the highways of the State of Texas.

I am familiar with the requirements of the laws of the State of Texas as to the height, width, length, lighting and braking equipment, and licensing of trucks and equipment, and all trucks and equipment used by A. E. McDonald have met all such requirements.

In driving A. E. McDonald's trucks, I always kept within the speed limit prescribed by law and operated same safely and carefully with due regard to the rights of other motor vehicle operators on the highways. I am familiar with the physical and mechanical condition of Mr. McDonald's trucks and same are in such condition physically and mechanically that they may be safely operated over the highways of Texas.

111 W. D. COLVIN, witness for Complainant, (Affidavit):

My name is W. D. Colvin. I live in Waxahachie, Texas, and I am County Judge of Ellis County.

A. E. McDonald of Waxahachie, Texas, has been continuously operating trucks over the aforesaid Federal Highway since January 1st, 1933. I have had many opportunities to observe the trucks operated by A. E. McDonald and their manner of operation, and same have been carefully operated and in a manner safe to the general traveling public, and same have never been overloaded, all of said trucks complying in all respects with the police requirements of the State of Texas as to height, length, width, lighting and braking equipment, and other respects, and all of same are properly licensed under the laws of Texas.

T. P. GODFREY, witness for Complainant (Affidavit):

My name is T. P. Godfrey. I am Constable of Precinct No. 1, Ellis County, Texas.

A. E. McDonald of Waxahachie, Texas, has been continuously operating trucks over the aforesaid Federal Highway since 1933. I have had many opportunities to observe the trucks operated by A. E. McDonald and their manner of operation, and same have all been carefully operated and in a manner safe to the general traveling public, and same have never been overloaded, all of said trucks complying in all respects with the police requirements of the State of Texas as to height, length, width, lighting and braking equipments, and other respects, and all of same are properly licensed under the laws of Texas.

TOM J. BALL, witness for complainant (Affidavit):

My name is Tom J. Ball. I am Judge of the 40th Judicial District of Texas at Waxahachie, Ellis County, Texas.

A. E. McDonald of Waxahachie, Texas, has been continuously operating trucks over the Federal Highways since 1932. I have had many opportunities to observe the trucks operated by A. E. McDonald and their manner of operation, and same have been carefully operated and in a manner safe to the general traveling public, and same have never been overloaded, all of said trucks complying in all respects with the police requirements of the State of Texas as to height, length, width, lighting and braking equipment, and other respects, and all of same are properly licensed under the laws of Texas.

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W. E. ROTHROCK, witness for Complainant (Affidavit):

My name is W. E. Rothrock. I am City Marshal of Waxahachie, Ellis County, Texas.

A. E. McDonald has continuously operated trucks over the aforesaid Federal Highway since 1931. I have had many opportunities to observe the trucks operated by A. E. McDonald and their manner of operation, and same have been carefully operated and in a manner safe to the general traveling public, and same have never been overloaded, all of said trucks complying in all respects with the police requirements of the State of Texas as to height, length, width, lighting and braking equipment, and other respects, and all of same are properly licensed under the laws of Texas.

JOHN BERT GRAHAM, witness for Complainant (Affidavit):

My name is John Bert Graham and I am Mayor of the City of Waxahachie, Texas.

A. E. McDonald of Waxahachie, Texas has been continuously operating trucks over the aforesaid Federal Highway since 1932. I have had many opportunities to observe the trucks operated by A. E. McDonald and their manner of operation, and same have been carefully operated and in a manner safe to the general traveling public, and same have never been overloaded, all of said trucks complying in all respects with the police requirements of the State of Texas as to height, length, width, lighting and braking equipment, and other respects, and all of the same are properly licensed under the laws of Texas.

113 DAVE FEARIS, witness for Complainant, (Affidavit):

My name is Dave Fearis, and I am Sheriff of Ellis County, Texas.

A. E. McDonald of Waxahachie, Texas, has been continuously operating trucks over the aforesaid Feder-

al Highway since 1932. I have had many opportunities to observe the trucks operated by A. E. McDonald and their manner of operation, and same have been carefully operated and in a manner safe to the general traveling public, and same have never been overloaded, all of said trucks complying in all respects with the police requirements of the State of Texas as to height, length, width, lighting and braking equipment, and other respects, and all of same are properly licensed under the laws of Texas.

J. S. HERRING, witness for Complainant, (Affidavit):

My name is J. S. Herring. I am President of Ideal Laboratories, engaged in manufacturing and selling family medicines, flavoring extracts, and toilet articles, and have so been engaged since 1907.

In connection with such business I use commodities regularly moving in interstate commerce, same, for the most part, originating at Owens-Illinois Glass Company, Knox Glass Company, Atlantis Sales Corporation, Hockins Glass Company, destined for Waxahachie, Texas, and same moving continuously from origin to destination by some common carrier—either rail, water, or motor vehicle.

I have often required the interstate transportation services of A. E. McDonald and will continue to do so in the future.

A. E. McDonald has been continuously operating in interstate commerce since January 1st, 1933, to my knowledge.

114 JOHN GENARO, witness for Complainant, (Affidavit):

My name is John Genaro. I am engaged in the business of wholesale fruits and produce, and have been so engaged since 1913.

In connection with such business I use commodities regularly moving in interstate commerce, same, for the most part, originating at Virginia, Brazil, and Honduras, destined for Dallas, Texas, and same moving continuously from origin to destination by some common carrier—either rail, water, or motor vehicle.

I have often required the interstate transportation services of A. E. McDonald and will continue to do so in the future.

A. E. McDonald has been continuously operating in interstate commerce since January 1st, 1933, to my knowledge.

J. W. PRATER, witness for Complainant, (Affidavit):

My name is J. W. Prater. I am engaged in the business of the distribution of books, and have been so engaged since 1919.

In connection with such business I use commodities regularly moving in interstate commerce, same, for the most part, originating at Boston, Massachusetts, destined for Dallas, Texas, and same moving continuously from origin to destination by some common carrier—either rail, water, or motor vehicle.

I have often required the interstate transportation services of A. E. McDonald and will continue to do so in the future.

A. E. McDonald has been continuously operating in interstate commerce since July, 1934, to my knowledge.

J. V. FOLSON, witness for Complainant (Affidavit):

My name is J. V. Folson. I am engaged in the business of manufacturing and distributing electrical items, and have been so engaged for the last twenty-five years.

In connection with such business I use commodities regularly moving in interstate commerce, same, for the most part, originating in each and all of the New England States, and destined for Dallas, Texas, and same moving continuously from origin to destination by some common carrier—either rail, water, or motor vehicle.

I have often required the interstate transportation services of A. E. McDonald and will continue to do so in the future.

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A. E. McDonald has been continuously operating in interstate commerce since January 1, 1935, to my knowledge.

J. E. HUNT, witness for Complainant (Affidavit):

My name is J. E. Hunt. I am engaged in the business of importing and manufacturing coffee, and have been so engaged for the last five years.

In connection with such business I use commodities regularly moving in interstate commerce, same, for the most part, originating at Brazil, New Orleans, and New York, destined for Dallas, Texas, and same moving continuously from origin to destination by some common carrier—either rail, water, or motor vehicle.

I have often required the interstate transportation services of A. E. McDonald and will continue to do so in the future.

A. E. McDonald has been continuously operating in interstate commerce since January 1st, 1933, to my knowledge.

WM. E. WILDS, witness for Complainant (Affidavit):

My name is Wm. E. Wilds. I am engaged in the business of shipping cottonseed linters to Europe and locations in the United States, and have been so engaged for the last five years or longer.

In connection with such business I use commodities regularly moving in interstate commerce, same, for the most part, originating at Oil Mill locations in Texas and Oklahoma, destined for Houston and Galveston for Coastwise and European destinations, and same moving continuously from origin to destination by some common carrier—either rail, water, or motor vehicle.

I have often required the interstate transportation services of A. E. McDonald and will continue to do so in the future.

A. E. McDonald has been continuously operating in interstate commerce since January, 1934, to my knowledge.

116 W. H. MARSH, witness for Complainant (Affidavit):

My name is W. H. Marsh. I am engaged in the business of manufacturing glass, and have been so engaged for the last twenty-three years.

In connection with such business I use commodities regularly moving in interstate commerce, same, for the most part, originating at West Virginia, Pennsylvania and Oklahoma, destined for various Texas points, and same moving continuously from origin to destination by some common carrier—either rail, water, or motor vehicle.

I have often required the interstate transportation services of A. E. McDonald and will continue to do so in the future.

A. E. McDonald has been continuously operating in interstate commerce since April 1st, 1935, to my knowledge.

T. E. BURLESON, witness for Complainant (Affidavit):

My name is T. E. Burleson. I am engaged in the business of packing honey, and have been so engaged since 1926.

In connection with such business I use commodities regularly moving in interstate commerce, same, for the most part, originating at Waxahachie, Texas, destined for New York City, and same moving continuously from origin to destination by some common carrier—either rail, water, or motor vehicle.

I have often required the interstate transportation services of A. E. McDonald and will continue to do so in the future.

A. E. McDonald has been continuously operating in interstate commerce since January 1, 1933, to my knowledge.

T. S. CHRISTOPHER, witness for Complainant (Affidavit):

My name is T. S. Christopher. I am attorney of record for complainant in this case, and I know that complainant filed with the Interstate Commerce Commission at Washington, D. C., his application for an interstate common carrier motor carrier's certificate of convenience and necessity on the 8th day of February, A. D. 1936, same complying with the re-
117 quirements of the Motor Carrier Act, 1935, and the applicable rules and regulations of the Interstate Commerce Commission. A. E. McDonald has duly complied with all applicable rules and regulations of the Interstate Commerce Commission, including the filing of tariffs within the time prescribed.

BRYAN BELL, witness for Complainant (Affidavit):

My name is Bryan Bell. I have been employed with the Motor Transportation Division of the Railroad Commission of Texas since on and prior to June 1, 1935, and it is my duty to receive, check, approve, or

disapprove, and file insurance policies required of motor carriers under the Motor Carrier law of Texas.

A. E. McDonald has had approved policies of property damage, public liability, and cargo insurance continuously on file with such division of the Railroad Commission of Texas since on and prior to June 1, 1935.

BUCK EARLY, witness for Complainant (Affidavit-:

My name is Buck Early and I am Maintenance Engineer for the State Highway Department of the State of Texas.

Each and everyone of the public highways in Texas mentioned in the Bill of Complaint on file in this cause, and over which A. E. McDonald herein alleges that he has used and contends for a right to use in his interstate motor carrier operation for hire, are Federal Designated and Federal aided highways except the portion of one highway between Three Rivers and George West.

Evidence for Respondents.

Amended answer for respondents verified by Tilden L. Childs, was offered in evidence (shown on folios .... to .... of this record).

R. E. MOORE, witness for Respondents' (Affidavit):

"I, R. E. Moore, am the Clerk of the Court of Civil Appeals of the 3rd Supreme Judicial District of Texas at Austin, Texas, and as such Clerk it is my
118 official duty to receive and file all legal documents in connection with the proceedings in

such Court of Civil Appeals. There was recently pending in such Court of Civil Appeals a case styled Railroad Commission, et al., Appellant, vs. A. E. McDonald, Appellee, No. 8284, which was appealed from the District Court of Travis County, Texas. This cause was decided by the Court of Civil Appeals on the 8th day of January, A. D. 1936, by the Court's opinion being filed on such date and judgment being rendered on such date in accordance with such opinion, and such judgment has been by me duly entered of record in the minutes of this Court; that under the statutes of the State of Texas fifteen days is allowed from the date of the filing of the opinion of the Court of Civil Appeals in a cause and the rendition of a judgment in a cause within which parties litigant may file a motion for rehearing; that such time allowed by statute for the filing of rehearing in the above cause expired at 12:00 M. midnight, January 23rd-24th, A. D. 1936, and that no motion for rehearing has been filed in such cause in the Court of Civil Appeals of Austin prior to the expiration of the time allowed by law for the filing of same, as hereinabove indicated."

Respondents offered in evidence an affidavit by George A. Knapp (shown in assignment of error No. 4) and complainant objected to the admission of such evidence in its entirety because irrelevant and immaterial, outlining fully and completely the reasons for such objection to show its irrelevancy and immateriality; complainant objected to all the portions of such affidavit which showed on the face of same to be hearsay because same were hearsay; and complainant objected to all portions of such affidavit which related to the physical conditions of the various highways and bridges of the designated highway system of the State of Texas and their ability to withstand traffic burdens moving thereover, other than the particular highways sought to be used by complainant (as shown in Bill

of Complaint), because such portions were especially immaterial and irrelevant. The Court admitted such affidavit in evidence so far as same related to
119 the particular highways sought to be used by the complainant (as shown in Bill of Complaint), to which ruling of the Court complainant excepted; and the Court excluded from evidence such affidavit so far as same related to other highways and bridges of the designated highway system of the State of Texas and their ability to withstand traffic burdens thereover, to which ruling of the Court respondents excepted.

It is agreed by and between counsel for the respective parties hereto that the above and foregoing constitutes a true and correct condensed statement of the material evidence adduced and proceedings had upon the hearing of this cause, and that same may be approved and filed as part of the record herein.

WILLIAM McCRAW,
Attorney General of Texas,
CURTIS E. HILL,
Assistant Attorney General,
Attorneys for Respondents,
Ernest O. Thompson, C. V. Terrell, Lon A. Smith, each individually, The Railroad Commission of Texas, Walton D. Hood, W. B. Renfro and Tom Miller.

PRICE & CHRISTOPHER,
By T. S. CHRISTOPHER,
WM. E. DAHL,
Attorneys for Complainant.

The above and foregoing statement of the evidence having been presented to the Court and the Court having examined the same, hereby approves the same as a true and correct condensed statement of the ma-

terial evidence introduced before the Court on the trial of this cause.

120 It is Further Ordered that said statement of the evidence as above approved to be filed shall be included in the transcript of the record for the purpose of this appeal.

Dated this the 31st day of October, A. D. 1936.

JAMES C. WILSON,
Judge, United States District Court.

PRAECIPE FOR RECORD ON APPEAL INCLUDING WAIVER BY APPELLEE.

121 Filed Oct. 31, 1936.

(Title Omitted.)

To the Clerk of the United States District Court, Northern District of Texas, Fort Worth, Texas:

You will please prepare and certify a duly authenticated copy of the transcript of the record in the cause of A. E. McDonald, vs. Ernest O. Thompson, et al., No. 864—In Equity, for printing and for filing, and for use, in the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, in the appeal of Ernest O. Thompson, C. V. Terrell, and Lon A. Smith, each individually, the Railroad Commission of Texas, Walton D. Hood, W. B. Renfro, and Tom Miller, Appellants, vs. A. E. McDonald, Appellee, and you will please include therein the following:

122 1. Complainant's Bill of Complaint, filed January 17, 1936.

2. Respondents' Motion to Dismiss Complainant's Bill of Complaint, filed January 25, 1936.

3. Respondents' First Amended Answer (without exhibits) filed April 30, 1936.

4. Order granting permanent injunction, filed and entered July 16, 1936.

5. Finding of Fact and Conclusions of Law, filed July 14, 1936.

6. Motion of respondent's to Amend Decree, filed October 13, 1936.

7. Waiver of Service of Notice of Motion to Amend Decree, filed October 13, 1936.

8. Order Amending Decree, filed and entered October 13, 1936.

9. Petition of Ernest O. Thompson, C. V. Terrell, and Lon A. Smith, each individually, the Railroad Commission of Texas, Walton D. Hood, W. B. Renfro, and Tom Miller for appeal filed October 13, 1936.

10. Assignments of Error filed by Ernest O. Thompson, C. V. Terrell, and Lon A. Smith, each individually, the Railroad Commission of Texas, Walton D. Hood, W. B. Renfro, and Tom Miller, filed October 13, 1936.

11. Order Allowing Appeal and fixing appeal bond, filed and entered October 13, 1936.

12. Waiver of Citation on Appeal, filed October 13, 1936.

13. Appeal Bond and Order Approving Appeal Bond, filed October 13, 1936.

14. Statement of the Evidence, filed October 31, 1936.

15. This praecipe including waiver by appellee.

16. Clerk's Certificate.

17. You will please style the record on the appeal as follows: Ernest O. Thompson, et al, Appellants, vs. A. E. McDonald, Appellee.

WILLIAM McCRAW,
123 Attorney General of Texas,
CURTIS E. HILL,
Assistant Attorney General,
Attorneys for Appellants, Ernest O. Thompson, C. V. Terrell, Lon A. Smith, each individually, The Railroad Commission of Texas, Walton D. Hood, W. B. Renfro, and Tom Miller.

Waiver.

We, Price and Christopher, and William E. Dahl, attorneys for complainant, or appellee on appeal, hereby acknowledge receipt of a copy of the foregoing praecipe and waive further service of a copy of the same, and agree that the instruments called for in said praecipe may constitute the record on appeal in this cause.

PRICE & CHRISTOPHER,
By T. S. CHRISTOPHER,
WM. E. DAHL,
Attorneys of Record for A. E. McDonald.

CLERK'S CERTIFICATE.

I, GEO. W. PARKER, Clerk of the District Court of the United States in and for the Northern District of Texas, do hereby certify that the above and foregoing is a full, true, and correct copy and transcript of record of all papers called for in the praecipe which is a part of this transcript, in Cause No. 864 Equity, on the docket of aforesaid Court, wherein Ernest O. Thompson, et al. are appellants, and A. E. McDonald is appellee, as fully as the same remain on file and of record in my office at Fort Worth, Texas.

Witness my hand and seal of office at Fort Worth, Texas, this 5th day of November, 1936.

(Seal) GEO. W. PARKER, Clerk,
By RIVE J. McGREW, Deputy.

[fol. 159] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of February 22nd, 1938

No. 8286

ERNEST O. THOMPSON et al.

versus

A. E. McDONALD

On this day this cause was called, and, after argument by Albert G. Walker, Esq., for appellants, and T. S. Christopher, Esq., for appellee, was submitted to the Court.

[fol. 160] OPINION OF THE COURT—Filed April 12, 1938

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8286

ERNEST O. THOMPSON et al., Appellants,

versus

A. E. McDONALD, Appellee

Appeal from the District Court of the United States for the Northern District of Texas

(April 12, 1938)

Before Sibley and Holmes, Circuit Judges, and Mize, District Judge

MIZE, District Judge:

The appellants in this Court are the Railroad Commissioners of the State of Texas and certain enforcement officers of the State of Texas charged with the duty of enforcing the Motor Carrier Law within the State of Texas, and

were defendants in the Court below. Appellee was the complainant and by his bill of complaint filed on the 17th day of January, 1936 sought an injunction against the appellants to restrain them from interfering with him or his employees while they were engaged in his business of transporting [fol. 161] freight in interstate commerce while in the State of Texas.

Complainant alleged that for many years he had operated motor trucks in the transportation of property as an interstate common carrier for hire and that he had been regularly operating as such interstate common carrier by motor vehicle for hire many years prior to June 1, 1935 and at all times since June 1, 1935; that this controversy involves his right to continue so to operate as an interstate common carrier for hire by motor vehicle over the highways of Texas and Oklahoma under the interstate commerce clause of the Federal Constitution and particularly by reason of the enactment by Congress of the Motor Carrier Act of 1935; that for several years prior to June 1, 1935 and subsequent to that date he transported various commodities from points within the State of Texas to points in the State of Oklahoma, and in such transportation he especially used within the State of Texas Federal Highways No. 75, No. 77, No. 80, No. 81, No. 90, No. 281 and No. 290, and that these were all federal aided highways; that he used various highways within the State of Oklahoma and had been authorized by the State of Oklahoma so to do in his business of moving interstate commerce; that he has not engaged in transporting property, nor does he desire to engage in the transportation of property in intra-state commerce; that he was engaged exclusively in the transportation of interstate commerce.

He alleged that the Motor Carrier Act of 1935, passed by Congress of the United States, was approved August 9, 1935 and by its terms became effective on and after October 1, 1935, and that by this Act the sole and exclusive jurisdiction, power and authority to regulate the transportation of passengers and property by motor vehicle operating in interstate commerce is vested exclusively in The Interstate [fol. 162] Commerce Commission of the United States; that under the provisions of said Act he would be entitled to apply for and to receive from The Interstate Commerce Commission a certificate of public convenience and necessity and such permits as would entitle him to continue his operations over said various highways in the transportation of prop-

erty and goods moving in interstate commerce; and that he, under the terms and provisions of said Act, will be entitled to receive said certificates and such permits as a matter of right under the provisions of Section 206 of the Act; that under said Act as amended the time for applying for said certificate or permit had not expired and would not expire until January 29, 1936; that by order of The Interstate Commerce Commission the effective date of Section 206 of the Act, the time for applying for the certificate had been extended until the 12th day of February, 1936, and that he was engaged in taking active steps to secure said certificate and necessary permits and to file the proper application therefor; that he had practically completed his application for filing and that same would be filed with The Interstate Commerce Commission within the time prescribed by the Act of Congress and the order of the Railroad Commission; that at the time of the filing of his bill, no certificate or permit had been issued and that the time for the issuance of said certificates pursuant to said Act had not yet arrived; that the jurisdiction over the regulation and control of the transportation by motor vehicle of passengers and property in interstate commerce nevertheless now exclusively rests in The Interstate Commerce Commission.

He further averred that he had complied with all requirements of the aforesaid Act of Congress, or was attempting to comply therewith by filing the aforesaid application, and had at all times mentioned complied with all the appropriate and applicable police regulations of the State of Texas with reference to aforesaid Act of Interstate Commerce. He [fol. 163] averred further that the defendants were attempting to exercise the same control and power of regulation in the conduct of his interstate transportation business within the State of Texas as was exclusively vested in the Interstate Commerce Commission by the said Act of Congress. He averred that because he had not received from the Railroad Commission of Texas the certificate of convenience and necessity under and pursuant to said Texas statutes, defendants have refused to issue and deliver to him the license tags or numbers that are required by the Railroad Commission to be affixed to all motor vehicles carrying property in the transportation business for hire as common carriers in the State of Texas; that the Railroad Commissioners, the law enforcement officer and the Chief Inspector for the Railroad Commission of Texas had issued orders and instructions to all

inspectors and highway patrolmen of Texas and all law enforcement officers to arrest all of the drivers and stop the trucks of complainant on and after January 15, 1936; and that the defendants would carry these orders into effect unless restrained by decree of the Court.

He alleged that he had complied with all the police requirements of the State of Texas to permit him to operate in interstate commerce and at the time of the filing of his bill of complaint his trucks were loaded with freight to be moved in interstate commerce, but that if he attempted to move them, his employees would be stopped and arrested.

He averred that he had complied with all the laws of the State of Texas in the following manner:

1. That he had caused public liability to be issued and that same was then in full force and effect.

2. That his trucks were in excellent mechanical condition and properly registered for operation in the state in which they operate, and that his trucks were in every way suitable [fol. 164] to operate safely on the highways and to transport property within and through the state of Texas.

3. That he had offered to comply with every appropriate and applicable law of the State of Texas and all rules and regulations of the Railroad Commission of Texas.

He alleged that the aforesaid acts of the respondents and the threatened continued action of interfering with the conduct of his business are unlawful, arbitrary and without sanction of law, State or Federal, and constitute an invasion of his rights guaranteed under the laws of the Constitution of the United States in the following particulars:

1. That said acts deprived him of his rights under the Constitution vesting in the Congress of the United States exclusive jurisdiction over the regulation of interstate and foreign commerce.

2. That said action and conduct constituted an unlawful deprivation of his property and property rights under the Due Process Clause of the 14th Amendment to the Constitution.

Complainant failed to allege affirmatively that he had applied to the Railroad Commission of the State of Texas

for a permit and that he had shown to the Railroad Commission that the structure of the highways proposed to be used by him was such that their proper preservation would not be impaired by the use sought by him. Moreover, he failed to allege that the safety of the public upon said highways over which he sought his route would not be unreasonably endangered and that the additional use which he expected to impose upon said highways would not so congest traffic as to render them unsafe for the traveling public. Likewise, he did not allege affirmatively that the Railroad Commission of Texas had made an investigation of his [fol. 165] application to use these highways and found as a fact that the use to which he intended to put them would not unduly render them unsafe for traffic or be unreasonably destructive of the highways.

The defendants answered the bill and denied that the complainant had been engaged in the bona fide operation as a common carrier for hire in interstate or foreign commerce either prior to June 1, 1935 or since that time, and averred that he had been using the highways in violation of the laws of the State of Texas. They admitted, of course, the passage of the Motor Carrier Act of 1935 by Congress, but denied that said Act superseded the power of the Commission to provide for the safety of the traveling public on the roads, as well as the preservation of the highways of the State, and alleged specifically that the Railroad Commission "has the jurisdiction and power to prohibit the use of the highways of Texas for the transportation of property for hire if such highways are not of proper construction or in proper condition to maintain said traffic, or if the contemplated use of said highways by the complainant would increase the dangers and hazards on said highways and congest the traffic thereon and unreasonably interfere with the use thereof by the public, and respondents further say that Article 911a, Vernon's Annotated Civil Statutes 1925, commonly referred to as the 'Motor Carrier Bus Law of Texas' and Article 911b, Vernon's Annotated Civil Statutes 1925, commonly referred to as the 'Motor Carrier Truck Law of Texas', so far as such statutes effect the physical preservation of public highways of Texas and prevent an unreasonable interference by motor carriers for compensation and hire operated thereover with the use of such highways by the ordinary travel-

ing public, were, at the time of their enactment, and now are, proper, reasonable, and necessary police regulations of the State of Texas, regulating the use of the public highways by Motor Carriers for compensation and hire there-[fol. 166] over, and such statutes now remain in full force and effect to the extent that same effect the regulation of the use of the public highways of the State of Texas by Motor Carriers thereover for compensation and hire, whether operating in intrastate commerce or interstate commerce, notwithstanding the passage of the Motor Carrier Act of 1935."

Respondents averred specifically and affirmatively in their answer that on May 1, 1934 the complainant did file with the Railroad Commission an application for a certificate or permit to operate in interstate commerce over the route sought by his present bill and that this was denied by the Commission after a hearing had upon same, and made the findings of fact a part of its answer. The answer averred that the order denying the application was made on July 14, 1934 and thereafter the complainant appealed to the District Court of Travis County and that Court entered judgment for the complainant and granted the injunction. The Railroad Commission appealed to the Court of Civil Appeals from that judgment and the Court of Civil Appeals, after having considered the matter, reversed the trial court and held that the order of the Railroad Commission denying his application was valid. The answer further averred there was no application for a rehearing before the Court of Civil Appeals and that judgment then became final.

The answer denied that the complainant had complied with the police requirements of the State of Texas and that the complainant had endeavored to comply with or was complying with the laws of Texas.

Respondents further averred affirmatively that the highways over which complainant sought to operate are not in such condition as to justify the issuance of any permit to him, and that said highways are now so congested that his operation would unreasonably interfere with the uses thereof by the traveling public. Respondents denied that [fol. 167] their action or threatened action was unreasonable, arbitrary or without sanction of law. They alleged that notwithstanding the Motor Carrier Law of Congress,

the Railroad Commission of Texas retained jurisdiction to determine whether or not the highways of the State were of such construction or the traffic thereon in such congested condition as that complainant's operation would unreasonably interfere with the use of the highways by the traveling public; that this jurisdiction was not taken away by the Act of Congress.

Respondents further averred in their answer that should complainant present to the Commission an application to transport property for hire in interstate commerce over the highways of Texas, the said Commission would hear said application; that in hearing the application the Commission would require the applicant to show by facts that the highways proposed to be used by him were capable of withstanding the proposed use without undue injury and damage to them and without unreasonable interference with their use by the general public for ordinary purposes. The respondents specifically averred that the Commission would not require the applicant to prove that public convenience and necessity require the proposed service, nor would it consider the adequacy of the existing transportation facilities or the effect the proposed operation would have on the existing transportation facilities in determining whether or not it would authorize said applicant to operate over said highways.

The cause was heard upon the bill and answer, oral and documentary evidence. The lower court was of the opinion that the Motor Carrier Act of 1935 of Congress superseded the Texas Motor Truck laws in so far as the Texas Act gave to the Railroad Commission power to forbid the use of the highways by complainant's trucks when engaged exclu- [fol. 168] sively in interstate commerce. The bill of complainant in the present case, stripped of the conclusions of the pleader, alleges in short that he is entitled to the certificate of public convenience and necessity from the Interstate Commerce Commission, and is therefore entitled to operate over the highways of the State of Texas as a matter of right, and that the Motor Carrier Act of 1935 supersedes all laws of the State of Texas in so far as the control of the state highways over which interstate commerce may be carried is concerned. It is the contention of the appellee that the federal law is superior and exclusive in so far as the right to operate in interstate commerce is concerned

and if the Texas law as it existed prior to the Motor Carrier Act of 1935 empowered the State Railroad Commission to issue any kind of interstate certificate, that power was superseded by the Federal Act—that Congress occupied the entire field. It is the contention of the respondents that the Motor Carrier Act does not preclude the Railroad Commission of the State from regulating the use of the highways by interstate carriers in so far as the preservation and safety of the highways may be necessary.

The record in this case discloses that on May 1, 1934 the appellee filed his application with the Railroad Commission of the State of Texas and that tribunal, after a hearing, denied the application in July of that year. The opinion of the Commission discloses that it had given extensive investigation and serious thought to the application of complainant, as well as other applicants, and it made an exhaustive finding of fact and concluded that the application of the complainant should be denied. The Commission determined, from the hearing thus had, that heavy truck traffic, especially at night, makes the highways leading into the larger centers of population so dangerous that citizens are afraid to use the highways as much as they otherwise would; that citizens having business in the larger cities, such as Houston, Dallas and some of the others, are unable [fol. 169] to return home at night because of the danger, and remain in the cities rather than undertake to do so; that many of the citizens are deprived of the use of some of the principal highways by reason of heavy traffic leading to the large centers of population, and that citizens would use the highways more were it not for the fact that the truck traffic has caused such hazardous conditions that they fear for their safety if they undertake to use the highways. The Commission further found that at various seasons of the year there was a fluctuation of traffic, but particularly in the cotton season truck traffic was extremely heavy. The Commission had before it many of the citizens of the state, public officials and disinterested witnesses, and after a full hearing, denied the application of the complainant, from which order the complainant appealed, but the order of the Railroad Commission was upheld by the Court of Civil Appeals, the opinion of which is reported in Vol. 90, Southwestern Reporter (2d) page 581. It will be unnecessary to set out the details of the finding of the Commission for the

reason that the opinion of the Court of Civil Appeals of the State of Texas set out at length the opinion of the Railroad Commission.

Complainant contends that under Section 206 of the Motor Carrier Act of 1935 the Interstate Commerce Commission has exclusive jurisdiction over the highways and forbids state interference. He relies largely upon the authorities of Southwestern Greyhound Lines, Inc. v. Railroad Commission of Texas, et al., 99 S. W. (2d) 268; Railroad Commission, et al. v. Bates, et al., 108 S. W. (2d) 283; State, ex rel. L. & L. Freight Lines, Inc. v. Douglas, 169 So. 389; Houston E. & W. T. R. Co. v. U. S., 234 U. S. 342; Gibbon v. Ogden, 6 L. Ed. 23; and the authorities therein cited, and Motor Carrier Act, 49 U. S. C. A., Sections 301, et seq.

The authorities of appellee above cited are not controlling. Vernon's Ann. Civ. St. Tex., Article 911 (b) Sec. 6 [fol. 170] sets out the things which an applicant for a permit must show before it will be granted. Sections 6 and 9 of Article 911 (b) designate what the Commission shall consider in granting or refusing permits and certificates and these are further enlarged by Section 4 (d), which specifically makes it the duty of the Commission to regulate and supervise motor carriers in all matters whether therein specifically mentioned or not, so as, carefully, to preserve transportation and relieve undue burden on the highways arising by reason of the use of the highways by motor carriers, adjusting and administering its regulations in the interest of the public. It was held in the case of Wald Storage & Transfer Co. v. Smith, 4 Fed. Sup. 61, that the very purpose of the Act was to limit the use of the public roads by carriers for hire so as to conserve them for the more effective, safe and convenient use of the general public, the primary purpose for which they were intended, as well as to conserve and strengthen the transportation facilities of the State,—that the prime purpose of the Act was to conserve the roads for their primary uses. See also Texport Carrier Corporation v. Smith, et al., 8 Fed. Sup. 28. As stated by the Court in the Texport Carrier Corporation suit supra, the Motor Carrier Act of Texas is a comprehensive one and vests in the Railroad Commission exclusive powers and confers upon it important duties. It is plain, therefore, that the Legislature of Texas undertook

to vest in the Railroad Commission full jurisdiction over the public highways of the State of Texas, and imposed the duty upon it to protect and preserve the highways of the state and to secure the safety of the traveling public thereon. Appellee, as above stated, contends that this authority is vested exclusively in the Interstate Commerce Commission by the Motor Carrier Act of 1935.

The Legislature, in the exercise of its police powers, has the authority to preserve its highways and protect the safety of the traveling public so long as its acts are not in [fol. 171] direct conflict with an Act of Congress regulating interstate commerce over the highways. Authority of the Legislature is limited or superseded by the Act of Congress only in so far as the Act of the Legislature may be in conflict with the express regulation of Congress. Congress, under its power to regulate interstate commerce, may occupy the entire field or it may limit its regulation, and when it does occupy the entire field, then state regulations by a Commission are void. But if Congress occupies only a limited field, then, such laws as the State may enact, within its police power, for the protection of its highways and the safety of the public thereon are valid, provided the Acts of the Legislature are not in direct conflict with the Act of Congress. Congress is not required to occupy the entire field and until it does so occupy the entire field, the states have a large area over which they may exercise the power appropriate to their jurisdiction.

This rule does not apply to the subject of Interstate Commerce demanding uniformity of regulation. With reference to that situation, the state is without power because the Constitution itself occupies the field in that class of cases, even though there be no federal legislation. The subject of protection of the highways in so far as they may be used for interstate commerce does not require uniformity of action, and, as a matter of fact, there is no uniformity of action by the various states at this time. The Interstate Commerce Commission has jurisdiction over the commercial considerations appertaining to the interstate truck business, but the preservation and safety of the roads themselves has been left with the State Commissions. It is well settled that if Congress occupies only a limited field, then state regulation is not prohibited. A state statute is super-

seded only when the conflict is so direct and positive that the two acts cannot be reconciled.

The Motor Carrier Act of 1935, passed by Congress, does [fol. 172] not provide for any tribunal to determine the method by which the public highways of any state shall be maintained or preserved, nor how the safety of the traveling public may be protected against any dangers that might be caused by an undue amount of traffic, nor does the Act authorize the Interstate Commerce Commission to make the rules or regulations with reference to this. Moreover, said Act does not provide that every person who shall receive a certificate of public convenience and necessity shall be entitled to the use of the various highways of the state, but the said Act prohibits anyone engaging in interstate commerce until he receives such certificates from the Interstate Commerce Commission. The Interstate Commerce Commission under the Act has the power and exclusive authority to pass upon such applications and to refuse them. If it should refuse one, then such applicant would not be permitted to engage in interstate commerce. This is made clear by the Act. That provision, however, is not in direct conflict with the provisions of the motor truck laws of the State of Texas which require the Railroad Commission of the State of Texas to determine whether or not the preservation of its highways and the safety of the traveling public will be endangered if there is an excessive amount of traffic on the highways. The determination of that question has been left to the states.

The question involved in this case has been settled by a decision of the Supreme Court of the United States handed down on February 14, 1938,—South Carolina State Highway Department, et al. v. Barnwell Bros. Inc., et al. It is unnecessary to comment on this case as it is decisive of the question involved in the instant case. An authority exceptionally applicable in principle and very clear in diction is that of Kelly v. State of Washington, 302 U. S. 1. These authorities supra and the authorities cited therein demonstrate clearly that the Legislature of the State of [fol. 173] Texas was acting within its powers and that its acts have not been superseded by the Motor Carrier Act of 1935.

The authority and control over the highways which the railroad Commission is attempting to exercise herein is not

the same authority and power to regulate interstate commerce as is vested in the Interstate Commerce Commission. The Interstate Commerce Commission has the power to act within the limits of the Motor Carrier Act but no other. The order of the Railroad Commission is not shown to be arbitrary or unreasonable, but, on the contrary, was reached after mature thought and thorough investigation.

Accordingly the judgment of the lower court is reversed and the case is remanded with instructions to dismiss the bill.

[fol. 174] JUDGMENT

Extract from the Minutes of April 12th, 1938

No. 8286

ERNEST O. THOMPSON et al.

versus

A. E. McDONALD

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with instructions to dismiss the bill;

It is further ordered, adjudged and decreed that the appellee, A. E. McDonald, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 175] MOTION AND ORDER STAYING MANDATE—Filed April 21, 1938

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8286

ERNEST O. THOMPSON et al., Appellants,

versus

A. E. McDONALD, Appellee

Petition for Stay of Mandate

Now comes Appellee, A. E. McDonald, and moves the Court to enter an order withholding the mandate in this case because it is the bona fide intention of the Appellee to make proper application to the Supreme Court of the United States for Writ of Certiorari in this case within the next ninety days, and in support hereof Appellee attaches the professional statement of his counsel, T. S. Christopher, of Fort Worth, Texas.

A. E. McDonald, Appellee.

[fol. 176] I hereby certify that it is the bona fide intention of the Appellee, A. E. McDonald, to remove this case to the Supreme Court of the United States by appeal or make application to said Court for Writ of Certiorari or do both as he may be advised within the next ninety days, and that I believe there is merit in his case and that the judgment of the United States Circuit Court of Appeals ought to be reversed by the Supreme Court of the United States.

T. S. Christopher, Attorney for A. E. McDonald, Appellee. A. E. McDonald, Appellee.

[fol. 177] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 8286

ERNEST O. THOMPSON et al., Appellants,

versus

A. E. McDONALD, Appellee

On consideration of the Application of the appellee in the above numbered and entitled cause for a stay of the mandate

of this court therein, to enable appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 21st day of April, 1938.
(Signed) Rufus E. Foster, United States Circuit Judge.

[fol. 178] CLERK'S CERTIFICATE

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

UNITED STATES OF AMERICA:

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 159 to 177 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8286, wherein Ernest O. Thompson, et al., are appellants, and A. E. McDonald is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 158 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 21st day of April, A. D. 1938.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit, by E. V. Vendling, Deputy Clerk. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 179] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1938

No. 55

A. E. McDONALD, Petitioner,

vs.

ERNEST O. THOMPSON et al.

ORDER ALLOWING CERTIORARI—Filed October 10, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

CLERK'S COPY.

ORIGINAL EXHIBITS

Supreme Court of the United States

OCTOBER TERM, 1938

No. 55

A. E. McDONALD, PETITIONER,

vs.

ERNEST O. THOMPSON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 21, 1938.

CERTIORARI GRANTED OCTOBER 10, 1938.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 55

A. E. McDONALD, PETITIONER,

vs.

ERNEST O. THOMPSON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 25, 1938.

—8107

[fols. 1-2] EXHIBIT "A"

ORDER GRANTING SPECIAL COMMODITY CARRIER PERMIT

Railroad Commission of Texas

Motor Transportation Division

Motor Carrier Docket No. 13047

Application of A. E. McDONALD, Waxahachie, Texas, for a Permit Authorizing the Operation of a Special Commodity Motor Carrier Service in the Transportation of Livestock, Livestock Feedstuffs, Wool, and Farm Machinery Over all the Highways of Texas

Austin, Texas, March 14, 1934.

Order

By the COMMISSION:

On the 14th day of March, 1934, the Railroad Commission of Texas took up for consideration the above styled application, the same having been filed on the 24th day of February, 1934, and notice of hearing thereon having been waived by protesting carriers. The applicant agreed to eliminate from his application all portions thereof except that asking for authority to transport Livestock. He further agreed that such permit should be restricted to transporting only Livestock belonging to the State or being distributed under State authority.

The Commission Finds: That the highways over which the principal portion of the prop-sed traffic will move are of such type of construction and in such state of repair and maintenance as will permit the additional traffic sought to be placed thereon by the applicant without unnecessary damage to said highways or without unreasonably interfering with the general public using said highways for general highway purposes; that the applicant has furnished satisfactory proof of his financial responsibility, and that the equipment proposed to be used by the applicant complies with the laws of this State in regard to safety, dimensions, etc. Therefore, after carefully considering the evidence, the law, and its own rules and regulations, the Commission

is of the opinion that the application should be granted, subject to the limitations and restrictions hereinafter set forth. Accordingly, it is.

Ordered by the Railroad Commission of Texas that the application of A. E. McDonald for a permit authorizing the operation of a Special Commodity Motor Carrier Service, be, and the same is hereby granted as follows:

To transport, between all points in Texas Livestock belonging to or being distributed by or under authority of the Agricultural Department of the State of Texas.

Railroad Commission of Texas, Lon A. Smith, Chairman; C. V. Terrell, Commissioner.

Attest: C. F. Petet, Secretary. (Seal.)

TLC/mn.

[fol. 3] County of Travis,
State of Texas:

I, Wilma O'Neal, Acting Secretary of the Railroad Commission of Texas do hereby certify that the attached copy of Order granting Special Commodity Permit No. 13047 is a true and correct copy of the original document now on file as a part of the records of the Railroad Commission of Texas.

Given under my hand and seal of the Railroad Commission of Texas, this the 23 day of January, 1936.

C. F. Petet, Wilma O'Neal, Acting Secretary, Railroad Commission of Texas.

[fol. 4] Duplicate

Special Commodity Carrier Permit No. 13047

Application No. 13047.
Docket No. 13047.

Special Commodity Carrier Permit

Railroad Commission of Texas

Motor Transportation Division

Austin, Texas, March 30, 1934.

(Name of Applicant:) A. E. McDonald, of (Address:) Waxahachie, Texas, having complied with all the requirements of Chapter 314, Acts, Regular Session of the Forty-

first Legislature, 1929, as amended at the Regular Called Session of the Forty-second Legislature, 1931, applicable to Special Contract Carriers and having declared an intention not to operate as a "Common Carrier" or "Contract Carrier" Motor Carrier, is entitled to and is hereby granted a permit to operate as a Special Commodity Carrier within the State of Texas and within the territory as follows:

It is especially understood and agreed that this permit authorizes the transportation of the following commodity only:

Livestock—Belonging to or being distributed by or under authority of the Agricultural Department of the State of Texas, between all Texas Points.

All equipment to be operated under authority of this Permit is to be restricted exclusively to that owned by the holder of such Permit and shall not exceed One Truck of more than 1½ tons capacity.

as more fully appears in this application filed herein. This permit to remain in effect from and after the date hereof, subject to the provisions of Chapter 314, Acts Regular Session of the Forty-first Legislature, 1929, as amended at the Regular Session of the Forty-second Legislature, 1931; the further orders of the Commission; and the rules and regulations of the Railroad Commission of Texas, heretofore prescribed or which may be hereafter prescribed under and pursuant to the authority conferred upon it by law.

Railroad Commission of Texas, Lon A. Smith, Chairman, C. V. Terrell, Commissioners.

Attest: C. F. Petet, Secretary. (Seal.)

Form 4191B—O-884-834-2500 in dup.

[fol. 5] County of Travis,
State of Texas:

I, C. F. Petet, Secretary of the Railroad Commission of Texas do hereby certify that the attached Copy of Special Commodity Permit No. 13047 is a true and correct copy of the original document now on file as a part of the records of the Railroad Commission of Texas.

Given under my hand and seal of the Railroad Commission of Texas, this the 23 day of January, 1936.

C. F. Petet, Secretary Railroad Commission of Texas.

EXHIBIT B

ORDER CANCELING SPECIAL COMMODITY PERMIT

RAILROAD COMMISSION OF TEXAS

MOTOR TRANSPORTATION DIVISION

MOTOR CARRIER DOCKET NO. 13047

MOTION OF THE RAILROAD COMMISSION OF TEXAS TO CANCEL SPECIAL COMMODITY PERMIT 13047 HERETOFORE ISSUED BY SAID COMMISSION

TO A. E. MCDONALD, WAXAHACHIE, TEXAS,

AUTHORIZING THE OPERATION OF A SPECIAL COMMODITY PERMIT

FOR FAILURE TO PAY TAX AND PLATE FEES AS REQUIRED BY LAW.

AUSTIN, TEXAS, OCTOBER 25, 193 4.

O R D E R

BY THE COMMISSION:

On October 25, 193 4 , the above styled application was called for hearing in its regular order on the Docket in the Capitol at Austin, Texas, the same being the time and place heretofore designated for such hearing, and notice of the same was filed with the operator, all interested parties, and the public generally, according to law.

At such time the applicant came not, either in person or by attorney, but wholly made default, and the Commission, after duly considering the law, the facts, and its own rules and regulations, is of the opinion that the same should be canceled. Accordingly, it is

ORDERED BY THE RAILROAD COMMISSION OF TEXAS that Permit No. 13047 , as above described, be, and the same is hereby canceled, effective the 1st day of September 1934.

RAILROAD COMMISSION OF TEXAS

Lon A. Smith
Chairman

Commissioner

ATTEST:

MOTOR REGISTRATION DIVISION

MOTOR CARRIER DOCKET NO. 13047

MOTION OF THE RAILROAD COMMISSION OF TEXAS TO CANCEL SPECIAL COMMODITY PERMIT 13047 HERETOFORE ISSUED BY SAID COMMISSION

TO A. E. MCDONALD, WAXAHACHIE, TEXAS,

AUTHORIZING THE OPERATION OF A SPECIAL COMMODITY PERMIT

FOR FAILURE TO PAY TAX AND PLATE FEES AS REQUIRED BY LAW.

AUSTIN, TEXAS, OCTOBER 25, 193 4.

O R D E R

BY THE COMMISSION:

On October 25, 193 4 , the above styled application was called for hearing in its regular order on the Docket in the Capitol at Austin, Texas, the same being the time and place heretofore designated for such hearing, and notice of the same was filed with the operator, all interested parties, and the public generally, according to law.

At such time the applicant came not, either in person or by attorney, but wholly made default, and the Commission, after duly considering the law, the facts, and its own rules and regulations, is of the opinion that the same should be canceled. Accordingly, it is

ORDERED BY THE RAILROAD COMMISSION OF TEXAS that Permit No. 13047 , as above described, be, and the same is hereby canceled, effective the 1st day of September 1934.

RAILROAD COMMISSION OF TEXAS

Lon A. Smith
Chairman

Commissioner

ATTEST:

Emily D. Thompson
Commissioner

Secretary

TLC/mn

EXHIBIT C

O-140-1132-13M

COMMON CARRIER MOTOR OPERATOR'S APPLICATION TO OPERATE INTERSTATE

Note: Application will not be received and filed unless all requirements and instructions are complied with. Read application blank carefully before filling out.

Leave this Page Blank
to be used by the Commission.

Application No. 1044 Certificate No.

Docket No.

Applicant's Name

Address (Street)

(Town)

(State)

RECEIVED
MAY 1 1934
RAILROAD COMMISSION
Motor Transportation Division

RECORD

Filed

Set for Hearing

Place

Heard File C

Certificate Issued

Ins. Filed Name of Ins. Co.

Policy No. Date of Expiration

Termini: From to

OPERATE INTERSTATE

Note: Application will not be received and filed unless all requirements and instructions are complied with. Read application blank carefully before filling out.

Leave this Page Blank to be used by the Commission.

Application No. 1044 Certificate No.

Docket No.

Applicant's Name

Address (Street)

(Town)

(State)

RECEIVED
MAY 1 1934
RAILROAD COMMISSION
Motor Transportation Division

RECORD

Filed

Set for Hearing

Place

Heard File

Certificate Issued

Ins. Filed Name of Ins. Co.

Policy No. Date of Expiration

Termini: From to

Other information:

Filing Fee 25.00 c/e 333731
5-1-34

Application No. .....
(LEAVE BLANK)

APPLICATION FOR CERTIFICATE TO OPERATE A COMMON CARRIER. MOTOR CARRIER SERVICE

INTERSTATE.

BEFORE THE
RAILROAD COMMISSION OF TEXAS
MOTOR TRANSPORTATION DIVISION

To the Railroad Commission of Texas:

The undersigned hereby makes application for a certificate to operate as a Common Carrier Motor Carrier within the State of Texas, and respectfully submits the following facts required by law.

1. Print in full and accurate name and address of applicant.

A. E. McDonald

Print Address: Town Waxahachie ; Street ; State Texas

2. State character of organization, that is whether individual, firm, association or corporation.

individual

3. Name and address of officers, if a corporation.

4. If an individual, firm, or association, give names and address of all parties owning an interest in the motor freight truck line or organization.

A. E. McDonald Waxahachie, Texas.

5. Exhibit "A". Give a complete statement of financial condition of applicant, showing all assets of every kind and character and present value thereof, and all liabilities of every kind and character, including debts secured by mortgages and not secured, judgments, current indebtedness and all other liabilities. The statement should be typewritten on same sized sheet as this marked Exhibit "A" and attached to this application.

6. Exhibit "B." Number of trucks to be operated three

Give complete detailed information as follows regarding each truck operated, or to be operated, including reserve equipment:

(a) Name of manufacturer..... Motor No.....

To the Railroad Commission of Texas:

The undersigned hereby makes application for a certificate to operate as a Common Carrier Motor Carrier within the State of Texas, and respectfully submits the following facts required by law.

1. Print in full and accurate name and address of applicant.

A. E. McDonald

Print Address: Town Waxahachie ; Street ; State Texas

2. State character of organization, that is whether individual, firm, association or corporation.

individual

3. Name and address of officers, if a corporation.

4. If an individual, firm, or association, give names and address of all parties owning an interest in the motor freight truck line or organization.

A. E. McDonald Waxahachie, Texas.

5. Exhibit "A". Give a complete statement of financial condition of applicant, showing all assets of every kind and character and present value thereof; and all liabilities of every kind and character, including debts secured by mortgages and not secured, judgments, current indebtedness and oll other liabiliities. The statement should be typewritten on same sized sheet as this marked Exhibit "A" and attached to this application.

6. Exhibit "B." Number of trucks to be operated three

Give complete detailed information as follows regarding each truck operated, or to be operated, including reserve equipment:

(a) Name of manufacturer Motor No.

(b) Style and yearly model (h) Weight

(c) Capacity in tons (i) Length

(d) Motor Number (j) Width

(e) State License Number (k) Height unloaded

(f) Date purchased new

(g) Date purchased by applicant

If this space is not sufficient to describe all trucks, make typewritten sheet, same size as this, and attach to this application marked Exhibit "B". If it is attached as an exhibit, indicate that fact in the blank space here, listing all trucks on the exhibit, using above form.

EXHIBIT "D".

Applicant desires to operate from Waxahachie, Texas, to points in Oklahoma via Dallas and Denison, Texas over State highway No. 6 and from Waxahachie to points in Oklahoma via Fort Worth and Gainesville over State highway No. 34 from Waxahachie to Fort Worth and State highway No. 10 to Denton and State highway No. 40 from Denton to the Oklahoma State line; and from Denton to Waxahachie via Dallas over State highway No. 40 from Denton to Dallas and from Waxhachie to Galveston via Ennis to Corsicana to Huntsville to Houston to Galveston traversing State highway No. 34 from Waxahachie to Ennis and from Ennis to Galveston, Texas over Federal highway No. 75; from Waxahachie to Hillsboro to Waco to Austin to San Antonio to McAllen traversing State highway No. 6 from Waxahachie to Hillsboro and Fed. highway No. 81 to San Antonio, Texas, and State highway No. 66 from San Antonio to McAllen, and from Waxahachie to Galveston traversing No. 6 and No. 2 to Waco Texas, and State highway No. 6 from Waco to Galveston via Houston. If the Commission finds that the highways from Galveston to Waxahachie are too congested to use Federal highway No. 75 from Houston to Huntsville then in the alternative applicant requests that he be given permission to use State highway No. 45 from Navasota to Huntsville thus using Fed. highway No. 75 to Houston, State highway No. 6 from Houston to Navasota State highway No. 45 from Navasota to Huntsville and Federal highway No. 75 to Ennis and State highway No. 34 from Ennis to Waxahachie.

Applicant would respectfully show the character of transportation he intends to engage in is the hauling for hire of commodities moving in interstate commerce. The highways are all weather, paved and are in good condition.

EXHIBIT "E".

Applicant will operate on an irregular schedule and at no time exceed one round trip schedule per day with not to exceed two trucks each.

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to Galveston traversing State highway No. 34 from Waxahachie to Ennis and from Ennis to Galveston, Texas over Federal highway No. 75; from Waxahachie to Hillsboro to Waco to Austin to San Antonio to McAllen traversing State highway No. 6 from Waxahachie to Hillsboro and Fed. highway No. 81 to San Antonio, Texas, and State highway No. 66 from San Antonio to McAllen, and from Waxahachie to Galveston traversing No. 6 and No. 2 to Waco Texas, and State highway No. 6 from Waco to Galveston via Houston. If the Commission finds that the highways from Galveston to Waxahachie are too congested to use Federal highway No. 75 from Houston to Huntsville then in the alternative applicant requests that he be given permission to use State highway No. 45 from Navasota to Huntsville thus using Fed. highway No. 75 to Houston, State highway No. 6 from Houston to Navasota State highway No. 45 from Navasota to Huntsville and Federal highway No. 75 to Ennis and State highway No. 34 from Ennis to Waxahachie.

Applicant would respectfully show the character of transportation he intends to engage in is the hauling for hire of commodities moving in interstate commerce. The highways are all weather, paved and are in good condition.

EXHIBIT "E".

Applicant will operate on an irregular schedule and at no time exceed one round trip schedule per day with not to exceed two trucks each.

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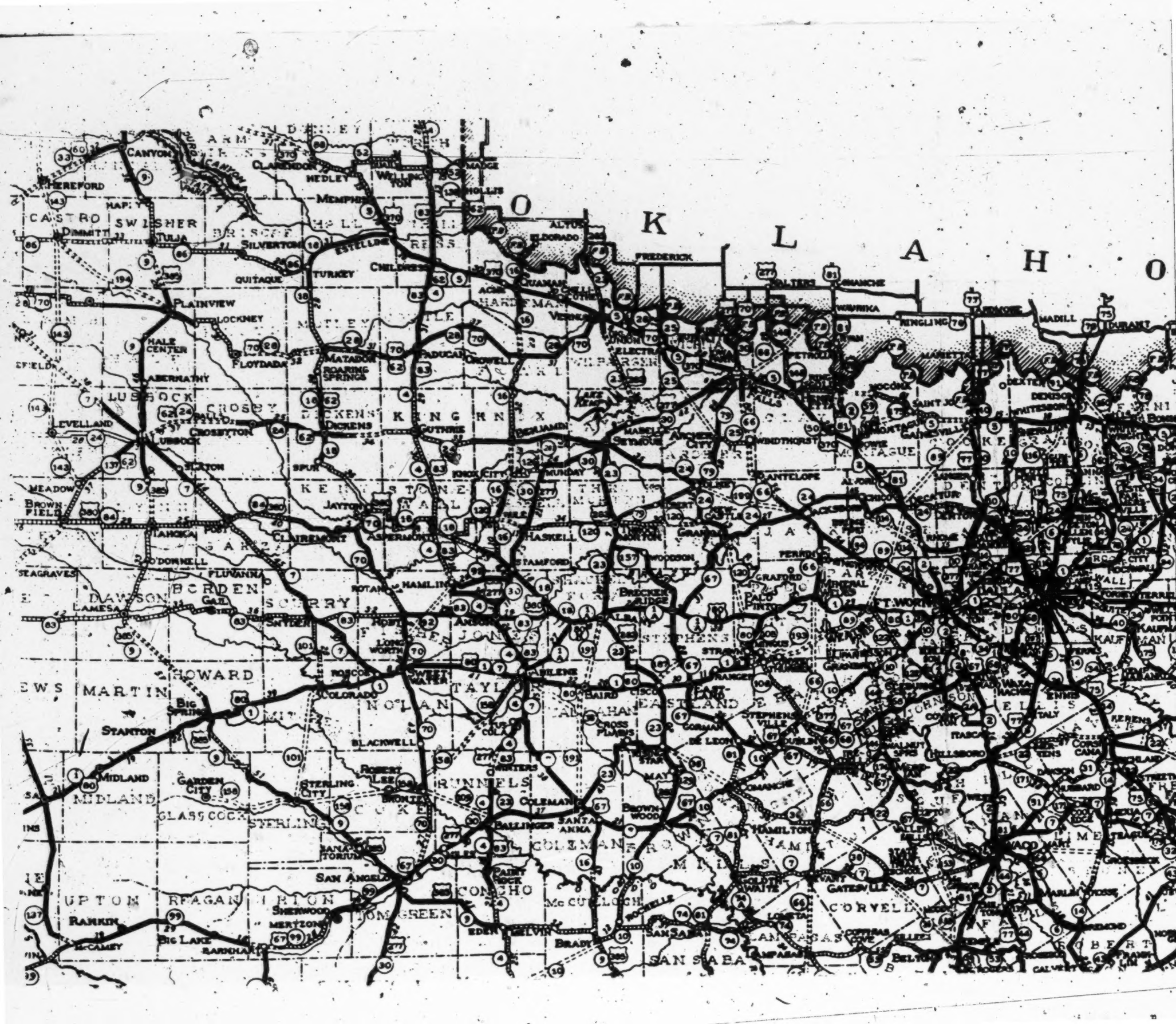
MAY 1 1934
RAILROAD COMMISSION
Motor Transportation Division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QUITAQUE
TURKEY
PLAINVIEW
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HALE CENTER
FLOYDADA
MATADOR
ROARING SPRINGS
PADUCAH
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ASPERMONT
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DAWSON
GAIL
SNYDER
ROTAN
HAMLIN
ANSON
ABILENE
BRECKENRIDGE
PALO PINTO
FT. WORTH
HOWARD
MARTIN
BIG SPRING
STANTON
COLORADO
SWEETWATER
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BLACKWELL
CROSS PLAINS
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GORMAN
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STEPHENSVILLE
DUBLIN
WALNUT SPRINGS
HILLSBORO
ITASCA
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GARDEN CITY
STERLING CITY
ROBERT LEE
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RUNNELS
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McCULLOCH
GATESVILLE
CORYELL
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SHERWOOD
MERTZON
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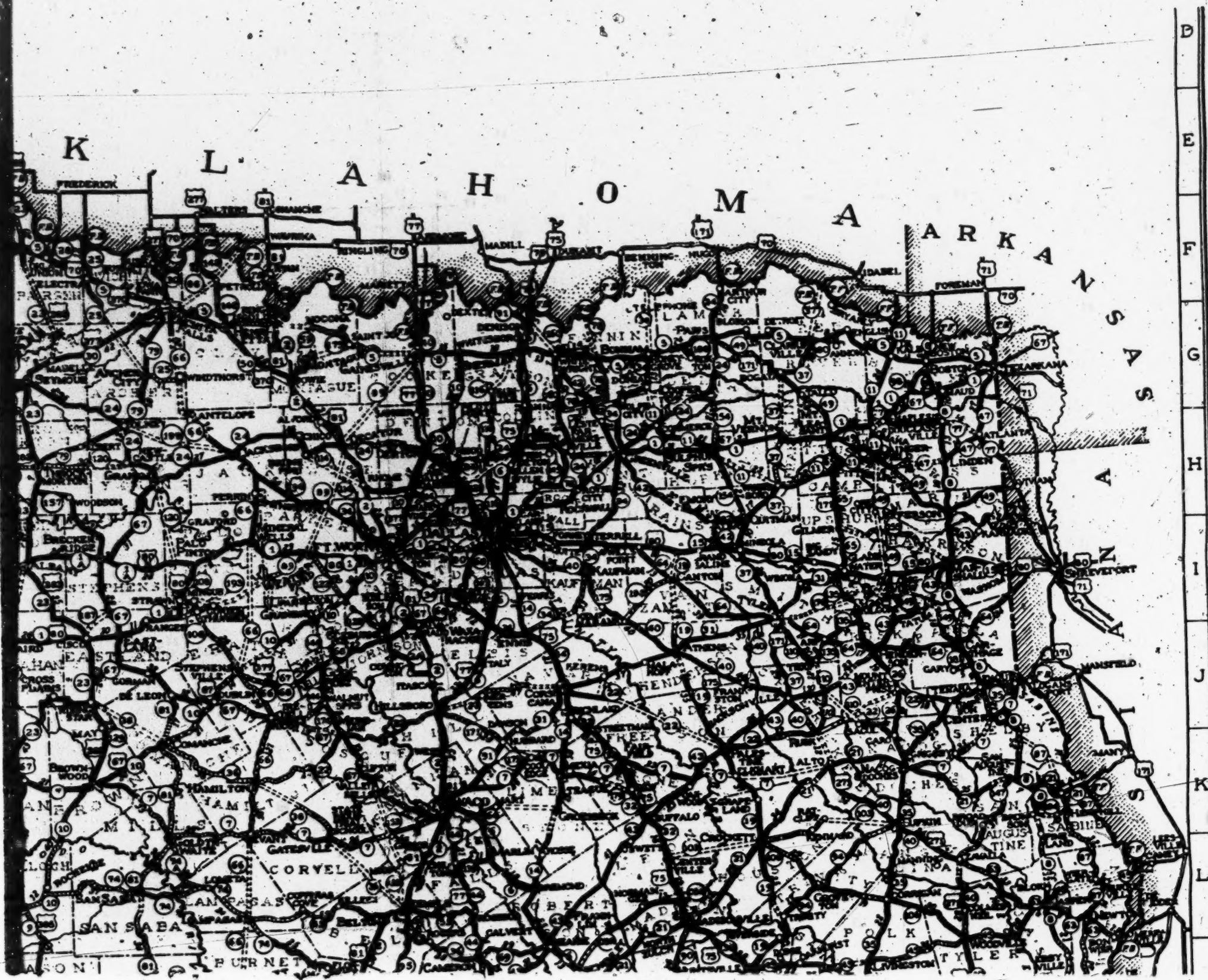
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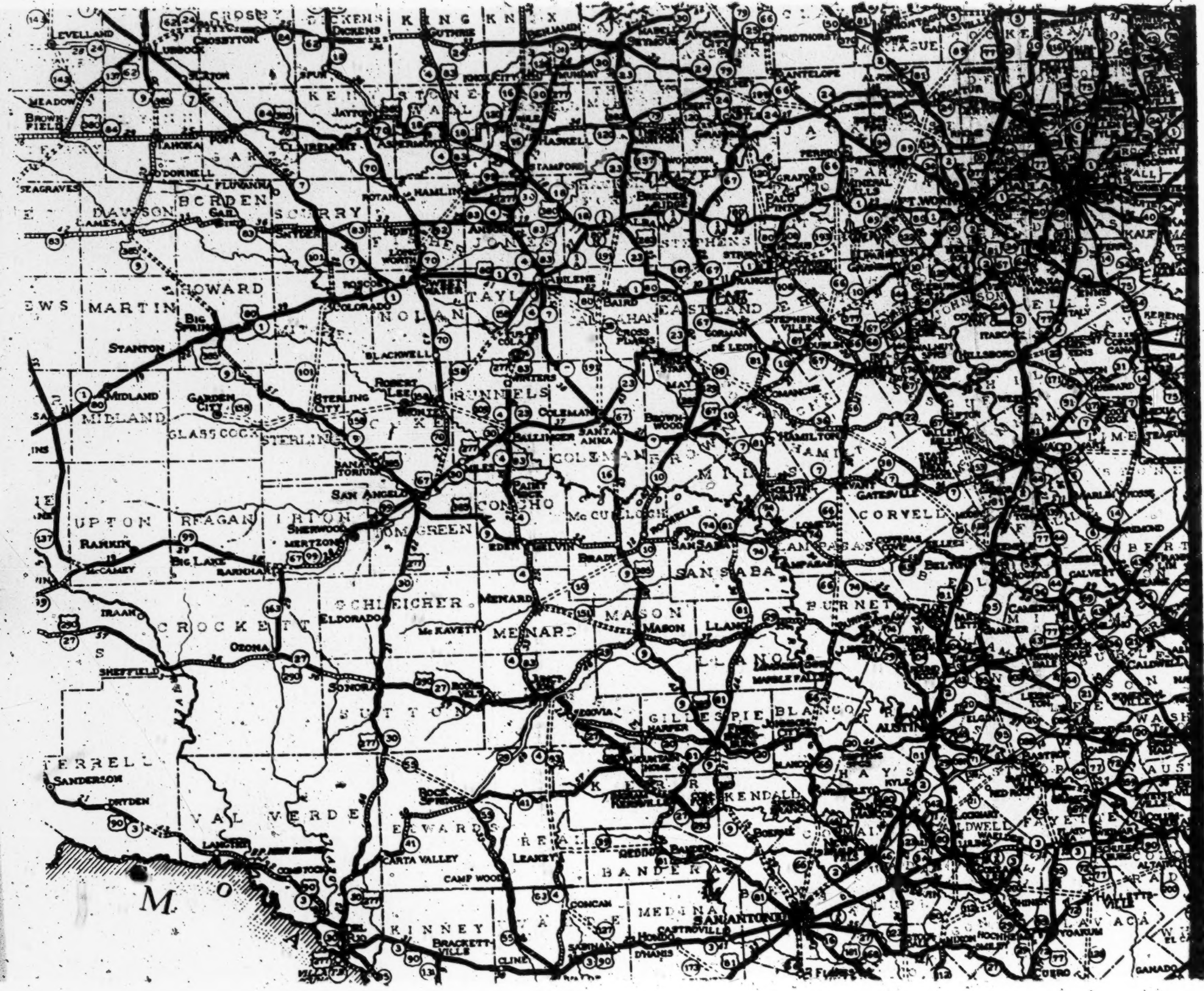
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McCULLOCH
SAN SABA
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KINNEY
BRACKETTVILLE
MEXICO
HOWARD
MARTIN
COLORADO
NOLAN
TAYLOR
RUNNELS
COLEMAN
BALLINGER
BLACKWELL
ROBERT LEE
WINTERS
BROWNWOOD
SANTA ANNA
PAINT ROCK
EDEN
MELVIN
BRADY
MILLS
HAMILTON
GATESVILLE
CORYELL
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MENARD
GILLESPIE
BLANCO
AUSTIN
KERR
KENDALL
BANDERA
MEDINA
SAN ANTONIO
CASTROVILLE
HONDO
D'HANIS
BANDERA
LEAKEY
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CONCAN
CLINE
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DICKENS
KING
HASKELL
THROCKMORTON
STAMFORD
JAYTON
SPUR
ROTAN
HAMLIN
ANSON
SWEETWATER
ROSCOE
LONG WORTH
ABILENE
BAIRD
CROSS PLAINS
CALLAHAN
SHACKELFORD
STEPHENS
PALO PINTO
BRECKENRIDGE
GRAHAM
WOODSON
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ROCK CITY
CLAIREMONT
O'DONNELL
FLUVANNA
GAIL
SNYDER
BORDEN
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EASTLAND
CISCO
RANGER
STEPHENSVILLE
DE LEON
COMANCHE
HAMILTON
GATESVILLE
CORYELL
BELTON
TEMPLE
WACO
MEXIA
GROESBECK
CALVERT
BRYAN
COLLEGE STATION
HEARNE
CALDWELL
LEXINGTON
TAYLOR
ROUND ROCK
GEORGETOWN
LOCKHART
LULING
SEGUIN
NEW BRAUNFELS
BOERNE
KERRVILLE
KYLE
SAN MARCOS
WIMBERLEY
BLANCO
FREDERICKSBURG
JUNCTION
ELDORADO
SONORA
OZONA
SHEFFIELD
IRAAN
BIG LAKE
RANKIN
McCAMEY
ODESSA
MIDLAND
STANTON
LAMESA
SEAGRAVES
MEADOW
BROWNFIELD
TAHOKA
POST
GUTHRIE
BENJAMIN
MARGET
SEYMOUR
OLNEY
WINDTHORST
ARCHER CITY
HOLLIDAY
WICHITA FALLS
GRAHAM
MINERAL WELLS
PALO PINTO
WEATHERFORD
FORT WORTH
DALLAS
ITASCA
HILLSBORO
WAXAHACHIE
CORSICANA
KERENS
ENNIS
WAXAHACHIE
CORSICANA
MEXIA
GROESBECK
LIMESTONE
FRANKLIN
MADISONVILLE
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BLANCO
FREDERICKSBURG
JUNCTION
GONZALES
YOAKUM
HALLETTSVILLE
VICTORIA
GANADO
EDNA
COLUMBUS
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WHARTON
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MATAGORDA
BAY CITY
PALACIOS
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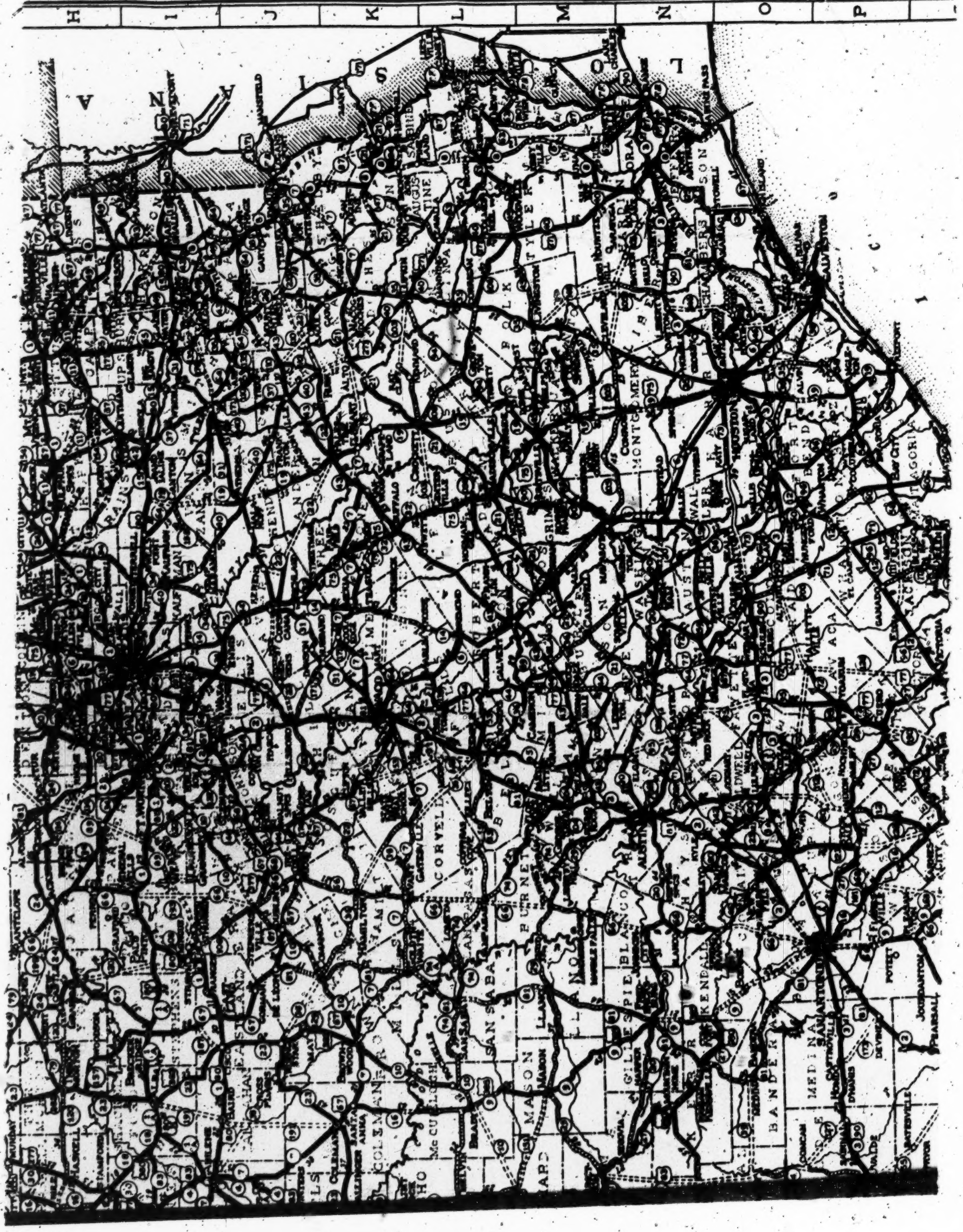
GULF OF MEXICO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IRION
REAGAN
UPTON
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LEE
FAYETTE
AUSTIN
WASHINGTON
BRAZOS
GRIMES
WALLER
HARRIS
MONTGOMERY
LIBERTY
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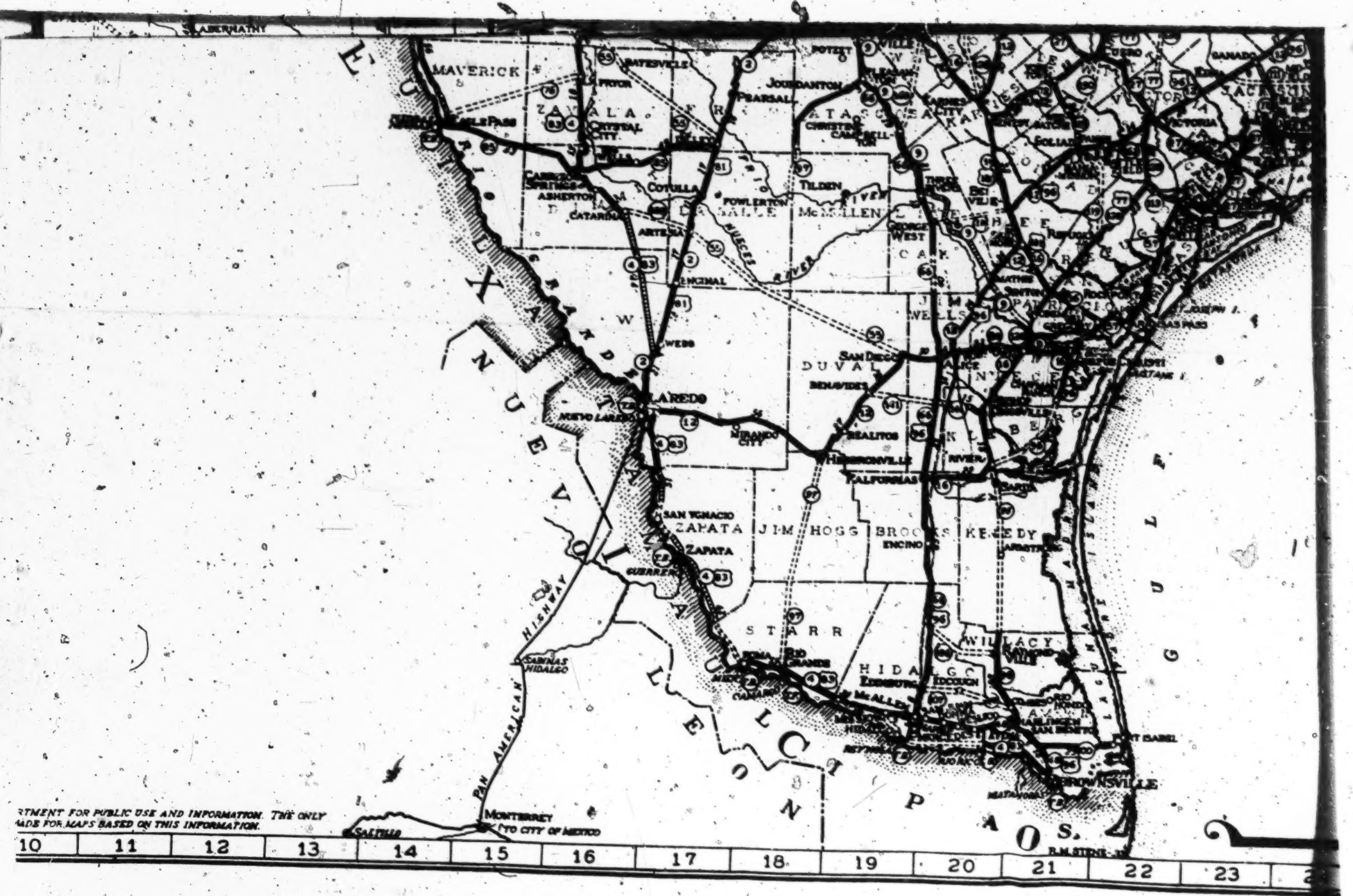
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TO CITY OF MEXICO
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LA SALLE
MCMULLEN
DUVAL
JIM HOGG
BROOKS
KENEDY
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EDINBURG
McALLEN
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MATAMOROS
PORT ISABEL
SAN BENITO
HARLINGEN
RAYMONDVILLE
WILLACY
CAMERON
ENCINO
REALITOS
HEBBRONVILLE
CALLAGHAN
SAN DIEGO
ARTESIA
COTULLA
TILDEN
FOWLERTON
CARRIZO SPRINGS
ASHERTON
CATARINA
PEARSALL
JOURDANTON
POTEET
PRYOR
BATESVILLE
CRYSTAL CITY
EAGLE PASS
ALPINE
MARFA
SANDERSON
DEL RIO
ROCKSPRINGS
SONORA
OZONA
MENARD
JUNCTION
KERRVILLE
BANDERA
HONDO
CASTROVILLE
D'HANIS
YANCEY
LA PRYOR
ARTESIA WELLS
GEORGE WEST
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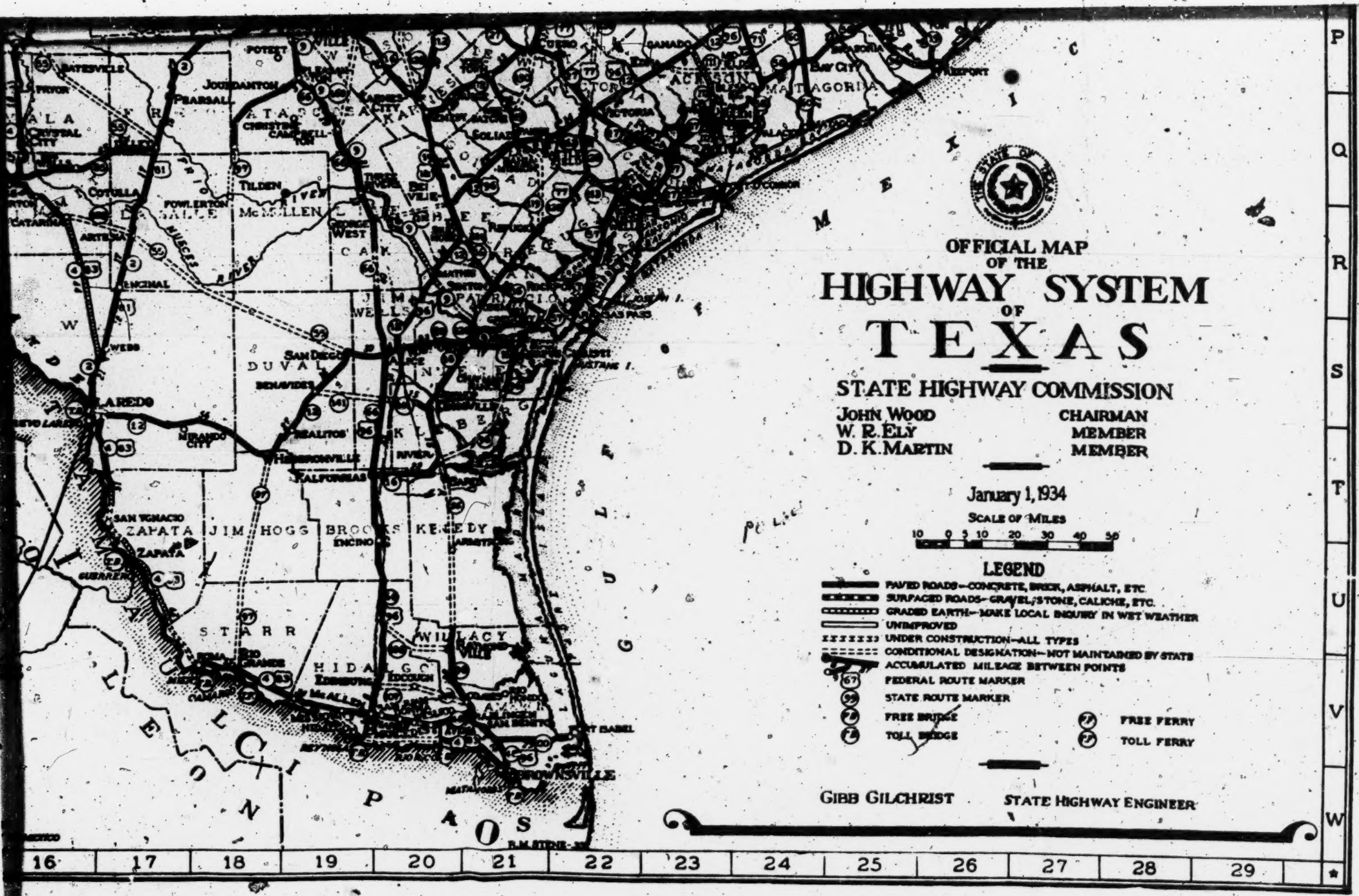
OFFICIAL MAP
OF THE
HIGHWAY SYSTEM
OF
TEXAS
STATE HIGHWAY COMMISSION
JOHN WOOD CHAIRMAN
W. R. ELY MEMBER
D. K. MARTIN MEMBER
January 1, 1934
SCALE OF MILES
10 0 5 10 20 30 40 50
LEGEND
PAVED ROADS—CONCRETE, BRICK, ASPHALT, ETC.
SURFACED ROADS—GRAVEL, STONE, CALICHE, ETC.
GRADED EARTH—MAKE LOCAL INQUIRY IN WET WEATHER
UNIMPROVED
UNDER CONSTRUCTION—ALL TYPES
CONDITIONAL DESIGNATION—NOT MAINTAINED BY STATE
ACCUMULATED MILEAGE BETWEEN POINTS
FEDERAL ROUTE MARKER
STATE ROUTE MARKER
FREE BRIDGE
TOLL BRIDGE
FREE FERRY
TOLL FERRY
GIBB GILCHRIST STATE HIGHWAY ENGINEER
MEXICO
GULF OF MEXICO
ZAPATA
JIM HOGS
BROOKS
KENEDY
STARR
WILLACY
HIDALGO
CAMERON
LAREDO
BROWNSVILLE
P Q R S T U V W
16 17 18 19 20 21 22 23 24 25 26 27 28 29

EXHIBIT "A".

ASSETS:

Cash on hand.	$1,000.00
Cold Storage Machinery & Equipment.	5,000.00
Plant Farm & Equipment	1,000.00
Farm	13,000.00
Accounts Receivable.	3,500.00
Truck Equipment	4,000.00
	$27,500.00

RECEIVED
MAY 1 1934
RAILROAD COMMISSION
Motor Transportation Division

LIABILITIES:

Truck	$ 500.00
Bank Note	450.00
Farm Loan	3,000.00
	$3,950.00

Exhibit "B" COMMON CARRIER CERTIFICATE NO. _____

1041

RAILROAD COMMISSION OF TEXAS
MOTOR TRANSPORTATION DIVISION
AUSTIN, TEXAS.

Operator A. E. McDonald.

Street _____ Town Waxahachie, Texas.

List of all equipment operated under above Certificate. Date 1 193__

Trucks and trucks and trailers where the two combined have only one carrying body.

TRUCK OR TRAILER	NAME OF MANUFACTURER	MOTOR NUMBER	TRUCK NO.	CAPACITY
Truck- Trailer	Chevrolet (1933)	3673866	1	1½ tons
" "	" (1932)	T3357436	2	1½ tons
" "	G M C (1933)	P878251	3	1½ tons

WEIGHT	LENGTH	WIDTH	HEIGHT UNLOADED
7000	28 ft.	7 ft.	8 feet
"	"	"	
"	"	"	

RECEIVED
MAY 1, 1934
RAILROAD COMMISSION
Motor Transportation Division

"	"	GMC	(1933)	P878251	3	1½ tons

WEIGHT	LENGTH	WIDTH	HEIGHT UNLOADED
7000	28 ft.	7 ft.	8 feet
"	"	"	
"	"	"	

RECEIVED
MAY 7 1934
RAILROAD COMMISSION
Motor Transportation Division

STATE OF TEXAS

COUNTY OF _____

_____
MOTOR CARRIER SIGN HERE

Before me, the undersigned authority, on this _____ day of _____ 193__. personally appeared _____ who being by me duly sworn states that the aboveand foregoing report is true and correct, and that each unit described therein is legally owned by the owner and holder of the above Certificate.

Witness my hand and the seal of office this _____ day of _____ 193__.

_____
NOTARY PUBLIC

_____ COUNTY, TEXAS

ADDRESS: Motor Transportation Division, Austin, Texas.

7. Exhibit "C" Description of all other property owned and used in motor carrier service including repair shops, terminal and station facilities.

Repair Shops + Docks at Waxahachie Texas.

If this space is not sufficient, give complete description of all property on same size sheet as this, marked Exhibit "C," indicating that fact in this space.

8. Exhibit "D." Complete routes over which it is desired to operate.

Attach thereto a complete and accurately printed map or plat, showing on a large scale: (1) All highways traversed, giving State Highway Numbers; (2) Give accurately and in detail the names and addresses of all transportation companies, railroad, interurban, common carrier motor carriers, and contract carriers serving all or any portion of the territory covered by this application. Use same sized sheet of paper as this and attach to this application, marked Exhibit "D."

9. Exhibit "E." Schedule of proposed service, showing the time for departure and arrival at terminal and way stations. Attach sheet, same size as this, showing full details, marked Exhibit "E." If this is an application for additional service, then give schedules of existing service in detail.

R. E. McDonald

Applicant.

Dated at Dallas, Texas, Texas, April 30, 1934.

AFFIDAVIT

State of TEXAS

County of DALLAS

I, A. E. McDonald (Applicant), do solemnly swear that the facts stated in the foregoing application and all exhibits attached thereto are ture and correct and that said statement of facts constitutes a complete statement of the matters to which it relates.

R. E. McDonald

Subscribed and sworn to before me this the 30th day of April 1934.

[illegible]

plication, marked Exhibit "D."

9. Exhibit "E." Schedule of proposed service, showing the time for departure and arrival at terminal and way stations. Attach sheet, same size as this, showing full details, marked Exhibit "E." If this is an application for additional service, then give schedules of existing service in detail.

R E McDonald

Applicant.

Dated at Dallas, Texas, Texas, April 30, 1934.

AFFIDAVIT

State of TEXAS }
County of DALLAS }

I, A. E. McDonald (Applicant), do solemnly swear that the facts stated in the foregoing application and all exhibits attached thereto are ture and correct and that said statement of facts constitutes a complete statement of the matters to which it relates.

R E McDonald

Subscribed and sworn to before me this the 30th day of April, 1934.

Carl L Finney

Notary Public Dallas County, Texas

*If applicant is a corporation, the affidavit must be made by the president or other officer authorized by the by-laws of the corporation to act for it. If applicant is a firm or association, some member of such firm or association authorized to make such affidavit shall execute same.

OVER

Sec. 10. (Chapter 314, Acts of the 41st Legislature, 1929.) No application for a certificate of public convenience and necessity shall be considered by said Commission unless it be in writing and set forth the following facts:

(1) It shall contain the name and address of the applicant and the names and address of its officers, if any, and shall give full information concerning the financial condition and physical properties of the applicant.

(2) The complete route or routes over which the applicant desires to operate, together with a description of each vehicle which the applicant intends to use.

(3) A proposed time schedule and a schedule of rates to be charged between the several points or localities to be served.

(4) It shall be accompanied by a plat or map showing the route or routes over which the applicant desires to operate, on which plat or map shall be delineated the line or lines of any existing transportation company or companies serving such territory, with the names and addresses of the owner or owners thereof, and shall point out the inadequacy of existing transportation facilities or services, and shall specify wherein additional facilities or service are required and would be secured by the granting of said application.

[fol. 15] EXHIBIT E

ORDER DENYING INTERSTATE COMMON CARRIER CERTIFICATE

Railroad Commission of Texas

Motor Transportation Division

Motor Carrier Docket No. 1739

Application of A. E. McDonald, Waxahachie, Texas, for a Certificate Authorizing the Operation of a Common Carrier Motor Carrier Service Interstate from Waxahachie to Points in Oklahoma Via Dallas and Denison Over State Highway No. 6 and Via Fort Worth Over State Highway No. 34 Thence to Denton Over State Highway No. 10 and Thence to Oklahoma State Line Via Gainesville Over State Highway No. 40 from Waxahachie to Galveston Over State Highway No. 34 to Ennis Thence to Houston and Galveston Over Federal Highway No. 75; from Waxahachie to Hillsboro Over State Highway No. 6 Thence to San Antonio Over State Highway No. 2 and Thence to McAllen Over State Highway No. 66; from Waxahachie to Galveston Over State Highway No. 6 and 2 to Waco Thence to Galveston Via Houston Over State Highway No. 6.

Austin, Texas, July 14, 1934.

Opinion & Order

By the Commission:

On May 15, 1934, the above styled application was submitted to the consideration of the Railroad Commission in its Hearing Room in the Capitol in Austin, Texas, pursuant to notices having been issued and filed herein to all interested parties as well as the public in general according to law.

On 14th day of July 1934, the Railroad Commission took up for consideration the above styled application and after duly considering the facts, the law and its own rules and regula- reaches the following conclusion to-wit:

[fol. 16] The Commission has had before it during the last few months a number of applications of the same nature

as this, in which the applicants have asked for the privilege of using many of the principal highways of the state in the same manner as this applicant. In order for the Commission to determine whether, in its opinion, certain highways of this state are carrying all of the truck traffic that can be safely entrusted on said highways without unreasonably interfering with the use thereof by the general public, the Commission has held a number of hearings in various portions of the state in order that local officials, who are familiar with the condition of the highways in their respective localities and the amount of traffic that such highways are forced to carry, might be able to testify under oath concerning the same. Probably more than a hundred County Judges, County Commissioners, County Attorneys, Mayors, Members of the City Councils, Managers of Chambers of Commerce, School Superintendents, newspaper editors, merchants and other citizens have testified at these hearings against the granting of additional truck permits over highways through their cities and counties.

Many of these witnesses whose characters and reputations were not questioned and whose interests were apparently unselfish, have testified that owing to the fact that heavy truck traffic, and especially at night, makes the highways leading into the larger centers of population so dangerous that such citizens are afraid to use the highways as much as they otherwise would. Some witnesses testified that if business called them to Houston, Dallas, or other large cities and they were unable to conclude their business before dark they spent the night in such cities rather than risk themselves upon the highways after night. Many of these officials and citizen witnesses testified that they themselves and many of the citizens of their communities were deprived of the use of some of the principal highways by reason of heavy traffic over said highways leading to aforesaid centers of population, and that they would use the highways more, especially at night, were it not for the fact that truck traffic thereon caused such hazardous conditions that made them fear for their lives and limbs.

The evidence of these hearings showed conclusively that seasonable movements cause wide fluctuation of traffic. When crops proceed to market, truck traffic, especially, is greatly increased. Such crops, of course, vary in different sections of the state but when being marketed they nat-

urally cause business in all lines to expand during the movement. This state often produces five or six million bales of cotton annually and the bulk of this movement occurs during the period from September through the following four months. Dallas is one of the largest inland cotton concentration points in the world, while Houston and Galveston are two of the principal cotton shipping ports. Hundreds of thousands of bales of cotton have, in the past, moved by truck over the highways between Dallas and Houston while still many more bales passed through the State of Texas from points in Oklahoma and Arkansas destined for these port cities. It is true that business conditions over the country have slowed down truck and other traffic to some extent but the Commission has received a mandate from the Legislature to not only take into consideration present burdens but also future burdens which the state highways will be called upon to assume. Certificates or permits granted by the Commission are more or less of a permanent nature so long as the holders thereof comply with the law and with the rules and regulations of the Commission; therefore, to grant a certificate or permit during a light season or during a temporary business depression would result in adding traffic burdens to highways during busy seasons or when business conditions again return to normalcy. It is only natural to assume that the population of Texas will continue to increase and that with such increased population the highways will be called upon to assume more and more truck and motor traffic of vari-
[fol. 17] ous kinds. The fact that truck traffic uses the highways to the maximum at night only adds to their hazards and these hazards are magnified in the case of those citizens whose duties prevent them from enjoying the highways for recreation purposes during daylight hours and who, perhaps, are not expert drivers at night. The large toll of deaths and injuries on the most highly improved highways, in which trucks are involved, leads the Commission to place even more credence to the evidence gathered at the hearings for the purpose of ascertaining the condition of such highways, and is cumulative of the testimony of the many disinterested citizen witnesses and officials, that these highways are already carrying as much or more truck traffic than is reasonably safe for the general public.

Portions of many of the principal highways contain narrow paving surfaces that become rough and uneven from traffic and whose dirt shoulders present unusual hazards, especially during fall, winter and spring, which are rainy seasons, and when they are used to their maximum by heavy traffic in moving the cotton crop. The evidence conclusively showed that it was impossible for an ordinary passenger car and a truck of the width permitted under the general laws of this state to pass each other upon the roads of this character without one or both of such vehicles being compelled to traverse the dirt shoulder. It was further shown that trucks, by reason of their weight, were more jealous of holding the center of the road during wet weather than at other times as they were likely to become more unmanageable when turning out upon the wet dirt shoulders and this naturally adds to the hazards of the citizens using the highways for pleasure or in the ordinary pursuit of their business.

While the Commission has not attempted to assume jurisdiction over truck operations through incorporated cities and towns, the evidence has shown that usually the principal and often the only improved street is the one over which practically all of the through truck traffic flows. Other unimproved streets in many of the smaller cities and towns could not possibly carry this heavy traffic without being practically destroyed. These cities and towns are financially unable to properly police traffic and it would prove ruinous for them to be called upon to assume the burden of reconstructing their streets if the latter are destroyed by traffic. In many instances schools, churches, business houses and gins are located alongside of or closely adjacent to the state highway and it is necessary for citizens and children to use these highways daily, and they should not be called upon to risk their lives and limbs by having placed upon those highways such additional traffic as would unreasonably interfere with their use by such citizens and children.

There are at this time some five hundred trucks authorized to be operated out of Dallas as common carriers and one hundred and twenty-two trucks as contract carriers, while there are some four hundred common carriers operating out of Houston and fifty or sixty contract carrier trucks. In addition there are several hundred special com-

modity trucks operating out of Dallas and Houston, engaged in the transportation of various commodities but principally that of oil field equipment. In addition to these motor carrier trucks, the Highway Department records show that more than 120,000 trucks, 19,000 trailers and 883,000 passenger cars had been registered by that Department up to about the middle of May of this year.

[fol. 18] It is Therefore, Ordered Adjudged and Decreed by the Railroad Commission of Texas, that the application of A. E. McDonald, Waxahachie, Texas, for a certificate authorizing the operation of a Common Carrier Motor Carrier Service Interstate from Waxahachie to points in Oklahoma via Dallas and Denison over State Highway No. 6; and via Fort Worth over State Highway No. 34, thence to Denton over State Highway No. 10, and thence to Oklahoma State Line Via Gainesville over State Highway No. 40; from Waxahachie to Galveston over State Highway No. 34 to Ennis thence to Houston and Galveston over Federal Highway No. 75; From Waxahachie to Hillsboro over State Highway No. 6, thence to San Antonio over State Highway No. 2 and thence to McAllen over State Highway No. 66; From Waxahachie to Galveston over State Highway No. 6 and 2; Waco Thence to Galveston Via Houston over State Highway No. 6, be and the same is hereby denied. This order subject to the further orders of the Railroad Commission.

Railroad Commission of Texas, —— ——, Chairman; C. V. Terrell, Ernest O. Thompson, Commissioners.

Attest: C. R. McNamee, Acting Secretary.

VBG: s.

(Here follow four photolithographs, side folios 19, 20, 21 and 21½)

EXHIBIT J

T178-622-1M

COMMON CARRIER MOTOR OPERATOR'S APPLICATION TO OPERATE INTRASTATE

Note: Application will not be received and filed unless all requirements and instructions are complied with. Read application blank carefully before filling out.

Leave this Page Blank
to be used by the Commission.

Application No. 1210 Certificate No.

Docket No. 1920

Applicant's Name A. E. McDONALD

Address (Street)

(Town) Waxahachie, Texas

(State)

RECEIVED
SEP 4 1935
RAILROAD COMMISSION
Motor Transportation Division

RECORD

Filed 9-4-35

Set for Hearing

Place

Heard

Certificate Issued

Ins. Filed Name of Ins. Co.

Policy No. Date of Expiration

Terminal From Houston to Wichita Falls-Abilene

T178-625-1M

COMMON CARRIER MOTOR OPERATOR'S APPLICATION TO OPERATE INTRASTATE

Note: Application will not be received and filed unless all requirements and instructions are complied with. Read application blank carefully before filling out.

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to be used by the Commission.

Application No. 1210 Certificate No.

Docket No. 1920

Applicant's Name A. E. McDONALD

Address (Street)

(Town) Waxahachie, Texas

(State)

RECORD

RECEIVED
SEP 4 1935
RAILROAD COMMISSION
Motor Transportation Division

Filed 9-4-35

Set for Hearing

Place

Heard

Certificate Issued

Ins. Filed Name of Ins. Co.

Policy No. Date of Expiration

Termini: From Houston to Wichita Falls-Abilene

Other information:

Filing Fee $5.00 Cov # 2617
9-4-35

Application No. _____
(Leave Blank)

APPLICATION FOR CERTIFICATE OF CONVENIENCE AND NECESSITY TO OPERATE A COMMON CARRIER MOTOR CARRIER

BEFORE THE
RAILROAD COMMISSION OF TEXAS

MOTOR TRANSPORTATION DIVISION

To the Railroad Commission of Texas:

The undersigned hereby makes application for a certificate of convenience and necessity to operate as a Common Carrier Motor Carrier within the State of Texas, and respectfully submits the following facts required by law.

1. Print in full and accurate name and address of applicant.

A. E. McDONALD,

Print Address: Town Waxahachie ; Street _____ ; State Texas

2. State character of organization, that is whether individual, firm, association or corporation.

Individual

3. Name and address of officers, if a corporation.

4. If an individual, firm, or association, give names and addresses of all parties owning an interest in the motor freight truck line or organization.

5. Exhibit "A." Give a complete statement of financial condition of applicant, showing all assets of every kind and character and present value thereof, and all liabilities of every kind and character, including debts secured by mortgages and not secured, judgments, current indebtedness and all other liabilities. The statement should be typewritten on same sized sheet as this, marked Exhibit "A" and attached to this application.

6. Exhibit "B." Number of trucks to be operated Four (4)

MOTOR TRANSPORTATION DIVISION

To the Railroad Commission of Texas:

The undersigned hereby makes application for a certificate of convenience and necessity to operate as a Common Carrier Motor Carrier within the State of Texas, and respectfully submits the following facts required by law.

1. Print in full and accurate name and address of applicant.

A. E. McDONALD,

Print Address: Town Waxahachie ; Street ; State Texas

2. State character of organization, that is whether individual, firm, association or corporation.

Individual

3. Name and address of officers, if a corporation.

4. If an individual, firm, or association, give names and addresses of all parties owning an interest in the motor freight truck line or organization.

5. Exhibit "A." Give a complete statement of financial condition of applicant, showing all assets of every kind and character and present value thereof, and all liabilities of every kind and character, including debts secured by mortgages and not secured, judgments, current indebtedness and all other liabilities. The statement should be typewritten on same sized sheet as this, marked Exhibit "A" and attached to this application.

6. Exhibit "B." Number of trucks to be operated Four (4)

Give complete detailed information as follows regarding each truck operated, or to be operated, including reserve equipment:

(a) Name of manufacturer See Exhibit "B" Motor No.

(b) Style and yearly model

(c) Capacity in tons

(d) Motor Number

(e) State License Number

(f) Date purchased new

(g) Date purchased by applicant

(h) Weight

(i) Length

(j) Width

(k) Height unloaded

If this space is not sufficient to describe all trucks, make typewritten sheet, same size as this, and attach to this application marked Exhibit "B." If it is attached as an exhibit, indicate that fact in the blank space here, listing all trucks on the exhibit, using above form.

EXHIBIT "A"

FINANCIAL STATEMENT.

Assets:	
Cold storage plant and equipment.....	$5,000.00
Trucks	8,000.00
Notes and accounts receivable.....	7,000.00
Real estate, (Farm land).....	13,000.00
Plant farm, shipping and packing sheds...	2,000.00
Real estate, (Homestead).....	6,000.00
Stocks and bonds.....	2,500.00
Cash on hand and in bank.....	1,500.00
	$45,000.00
Liabilities:	
Note on farm land.....	4,000.00
Due on trucks.....	750.00
	$ 4,750.00

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Motor Transportation Division

EXHIBIT "B"

_____ CARRIER Certificate Permit No. _____

RAILROAD COMMISSION OF TEXAS
MOTOR TRANSPORTATION DIVISION
AUSTIN, TEXAS

Operator A. K. McDONALD

Street _____ Town Waxahachie, Texas

List of all equipment operated under above permit. Date 8/30/35, 193_

Trucks and trucks and trailers where the two combined have only one freight carrying body.

TRUCK OR TRAILER	NAME OF MANUFACTURER	MOTOR NUMBER	TRUCK NO.	CAPACITY
One 1934 Model	Chevrolet Truck, delivery type. (Bob-tail)			
One 1935	Ford Truck, delivery type. (Bob-tail)			
One 1934	Ford Truck, delivery type. (Bob-tail)			
One 1933	Diamond-"T", delivery type. (Bob-tail)			

Motor numbers will be furnished at or before the hearing.

WEIGHT	LENGTH	WIDTH	HEIGHT UNLOADED

Length, width and height of above trucks are all within the statutory limits. Weights will be furnished at or before the hearing.

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Motor Transportation Division

One 1934 Model Chevrolet Truck, delivery type (Bob-tail)				
One 1935 Ford Truck, delivery type. (Bob-tail)				
One 1934 Ford Truck, delivery type. (Bob-tail)				
One 1933 Diamond-"T", delivery type. (Bob-tail)				

Motor numbers will be furnished at or before the hearing.

WEIGHT	LENGTH	WIDTH	HEIGHT UNLOADED

Length, width and height of above trucks are all within the statutory limits. Weights will be furnished at or before the hearing.

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RAILROAD COMMISSION
Motor Transportation Division

STATE OF TEXAS
COUNTY OF Travis

T. S. Christopher
(Motor Carrier sign here)

Before me, the undersigned authority, on this 30 day of August 193 5, personally appeared T. S. Christopher who being by me duly sworn states that the above and foregoing report is true and correct, and that each unit described therein is legally owned by the owner and holder of the above permit.

Witness my hand and seal of office this 30 day of August, 193 5

NOTARY PUBLIC Erin Jones Couch

Travis COUNTY, TEXAS

21½

180

[fol. 22] Exhibit "D"

Route Over Which Applicant Desires to Operate

1. Houston to Fort Worth and Dallas via Hempstead, Navasota, Bryan, Hearne, Waco, and Hillsboro, with service to all intermediate points, using State Highways Nos. 6, 2 and 34, and No. 1.

2. Bremond to Waxahachie via Groesbeck, Mexia, Corsicana and Ennis, using State Highways Nos. 14 and 34.

3. Waxahachie to Hillsboro via Alvarado and Itasca, using State Highways Nos. 68 and 2.

4. Fort Worth to Wichita Falls via Jacksboro, using State Highway No. 34.

5. Fort Worth to Big Spring via Weatherford, Ranger, Abilene and Sweetwater, using State Highway No. 1.

6. Waxahachie to Italy, to Frost, to Blooming Grove, to Bird, to Rankin, to Bardwell, to Avalon, to Nash, to Waxahachie, using all undesignated State Highways.

7. Waxahachie to Rocket, to Boyce, to Ferris, to Waxahachie, using all undesignated State Highways.

8. Waxahachie to Ovillia, Red Oak, to Waxahachie, using all undesignated State Highways.

9. We suggest as an alternative route from Weatherford to Ranger, State Highway No. 89, and as an alternative from Dallas to Fort Worth, State Highway No. 115, just north of the Trinity River.

10. The service proposed to be rendered along all of the routes described is intended to include all cities and towns along the Highways mentioned, although not specifically named.

[fol. 23] (2)

Sproles Motor Freight Lines
H. & N. T. Motor Freight Lines
English Motor Freight Lines
G. & H. Motor Freight Lines
Central Motor Freight Lines
Southern Pacific Railroad
Missouri Pacific Railroad

Missouri, Kansas & Texas Railroad
Texas & Pacific Railroad
Northern Texas Traction Company

(3)

This application is intended primarily to serve the applicant's own needs in delivering his own perishable merchandise to his customers along the routes described, from whom he either collects his transportation charge either directly or indirectly by selling his own merchandise to his customers along the routes described at prices higher than the price charged in Waxahachie. Applicant maintains cold storage plants at Waxahachie and handles fruits, fresh vegetables and general produce, all of a perishable nature. The transportation required is of such nature that existing common carriers cannot perform the service due to the quantities in which it is handled, the nature of the commodity itself, it being perishable and requiring quick delivery from the cold storage plant, and the nature of the applicant's business requires store-door deliveries at or near the opening hours of his various customers. Furthermore, many of the points along the routes described have no other common carrier service of any kind.

[fol. 24] Exhibit "E"

Schedule of Proposed Service

No regular schedules will be operated. The purpose of this application being, primarily, to accommodate the applicant's own business and to enable the applicant to haul his own products and merchandise. The applicant herein is engaged in a wholesale produce fruit and fresh vegetable business distributing his merchandise from his own cold storage plant in Waxahachie along all the routes described.

[fol. 25] Exhibit F

Rates

The rates proposed to be charged for all transportation will be in accordance with the rates promulgated and prescribed by the Railroad Commission of Texas, in accordance with their authority to prescribe maximum and minimum rates under the statutes.

(Here follow three photolithographs, side folios 26, 27 and 28)

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EXHIBIT D

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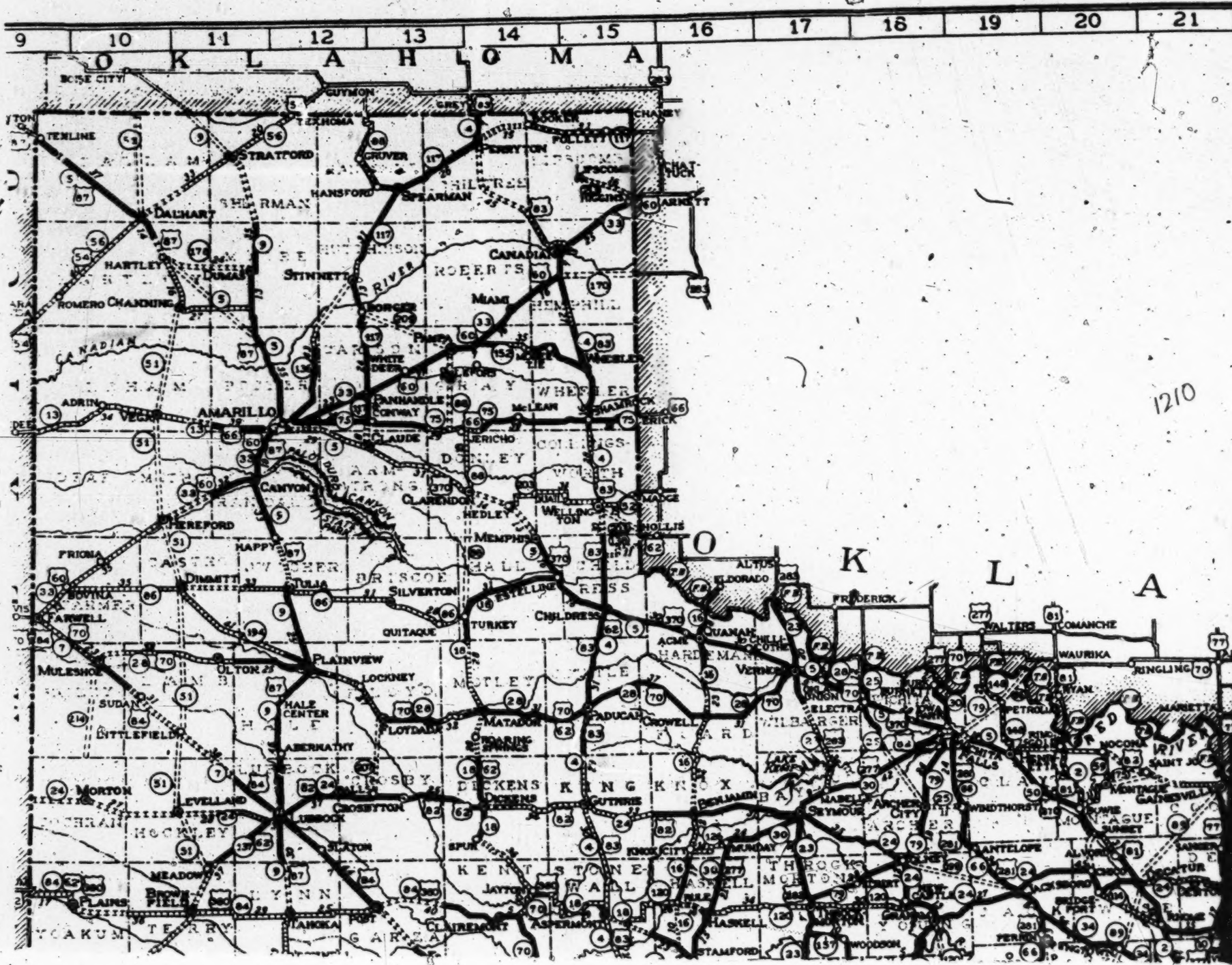

EXHIBIT D

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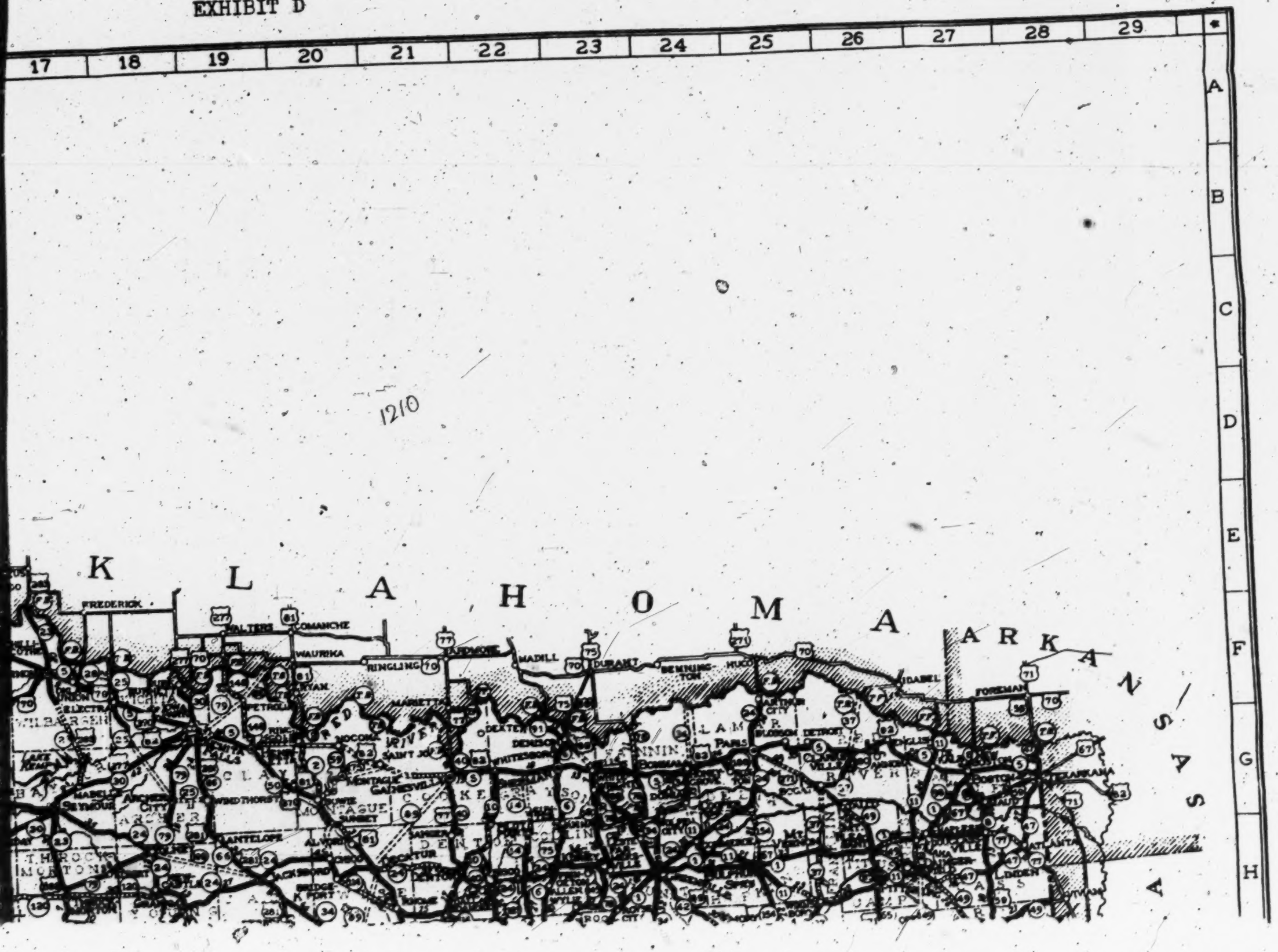

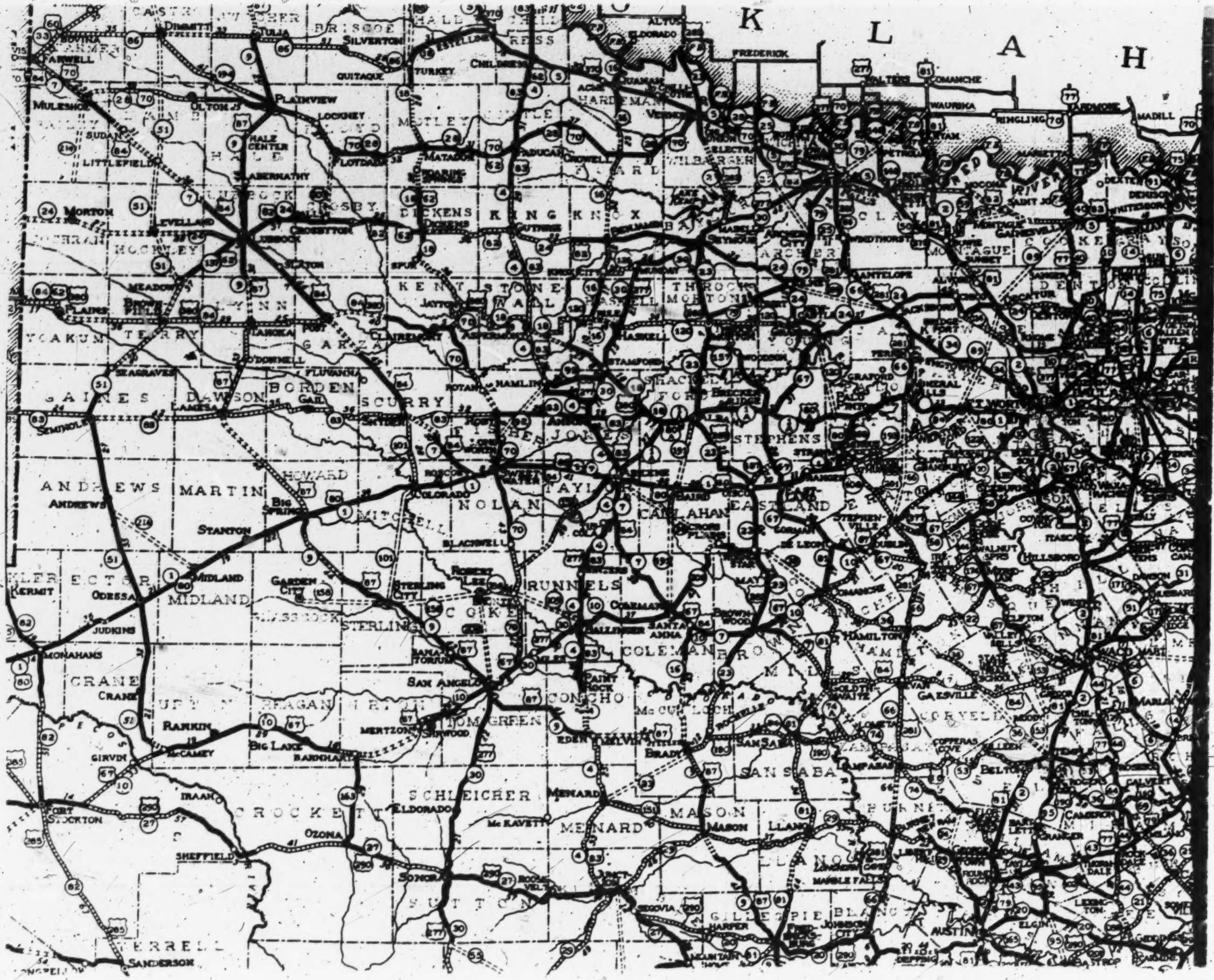
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MATADOR
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QUANAH
ACME
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HASKELL
THROCKMORTON
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DECATUR
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LYNN
MEADOW
BROWNFIELD
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ROTAN
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STERLING CITY
ROBERT LEE
RUNNELS
COLEMAN
BROWNWOOD
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CONCHO
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GATESVILLE
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COPPERAS COVE
BELTON
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McCAMEY
BIG LAKE
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ROCKDALE
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SMITHVILLE
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JOHNSON CITY
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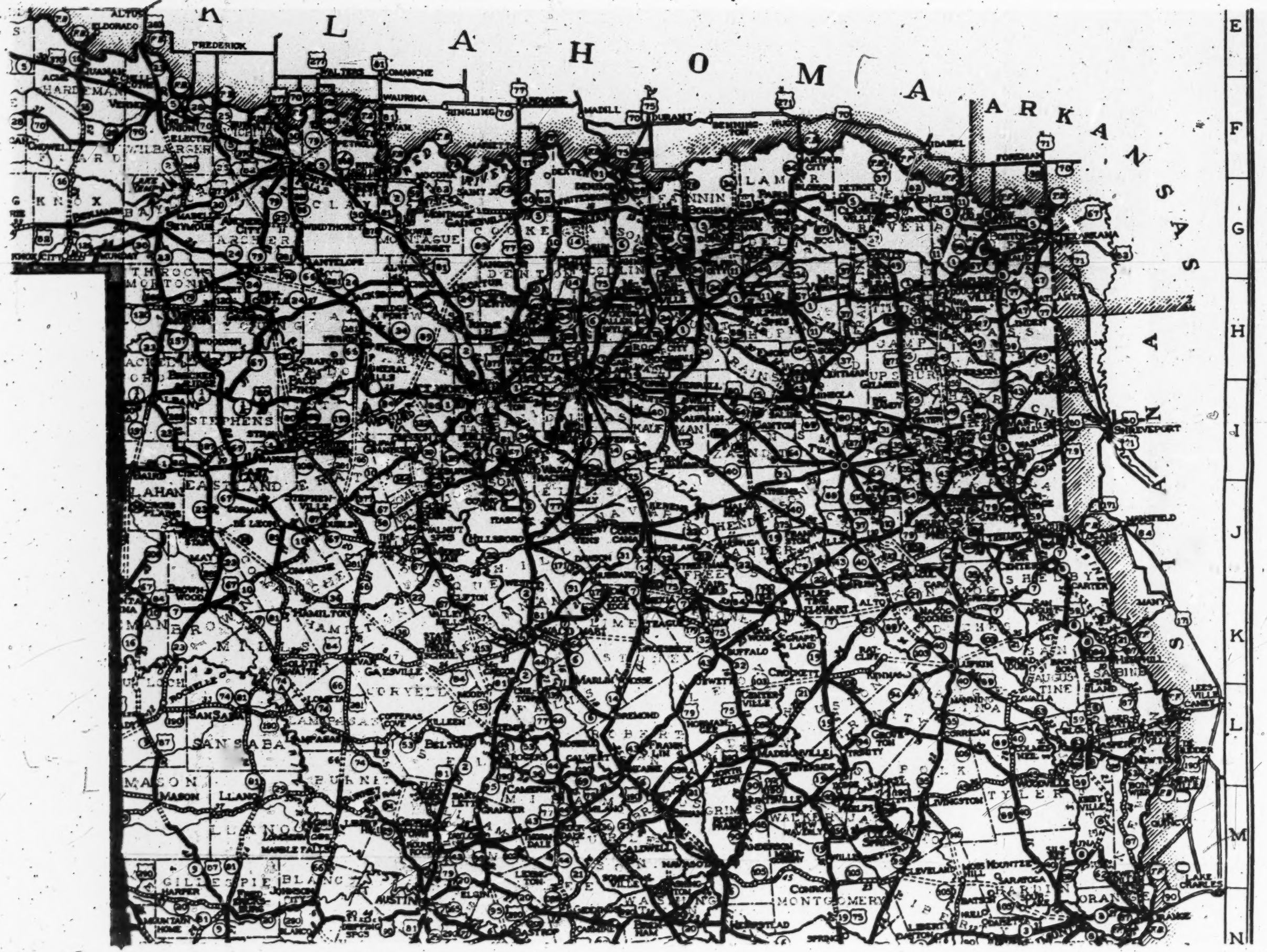
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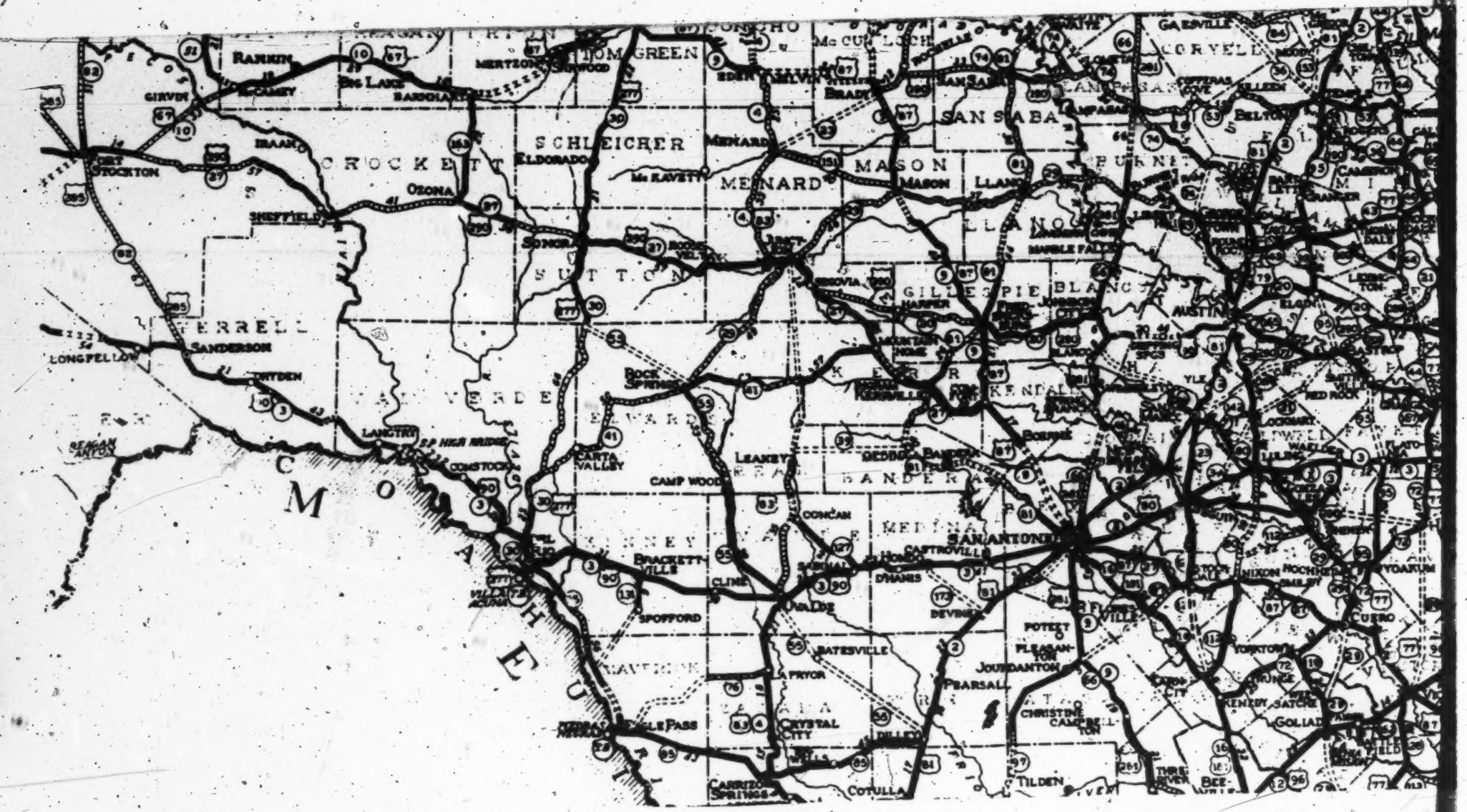
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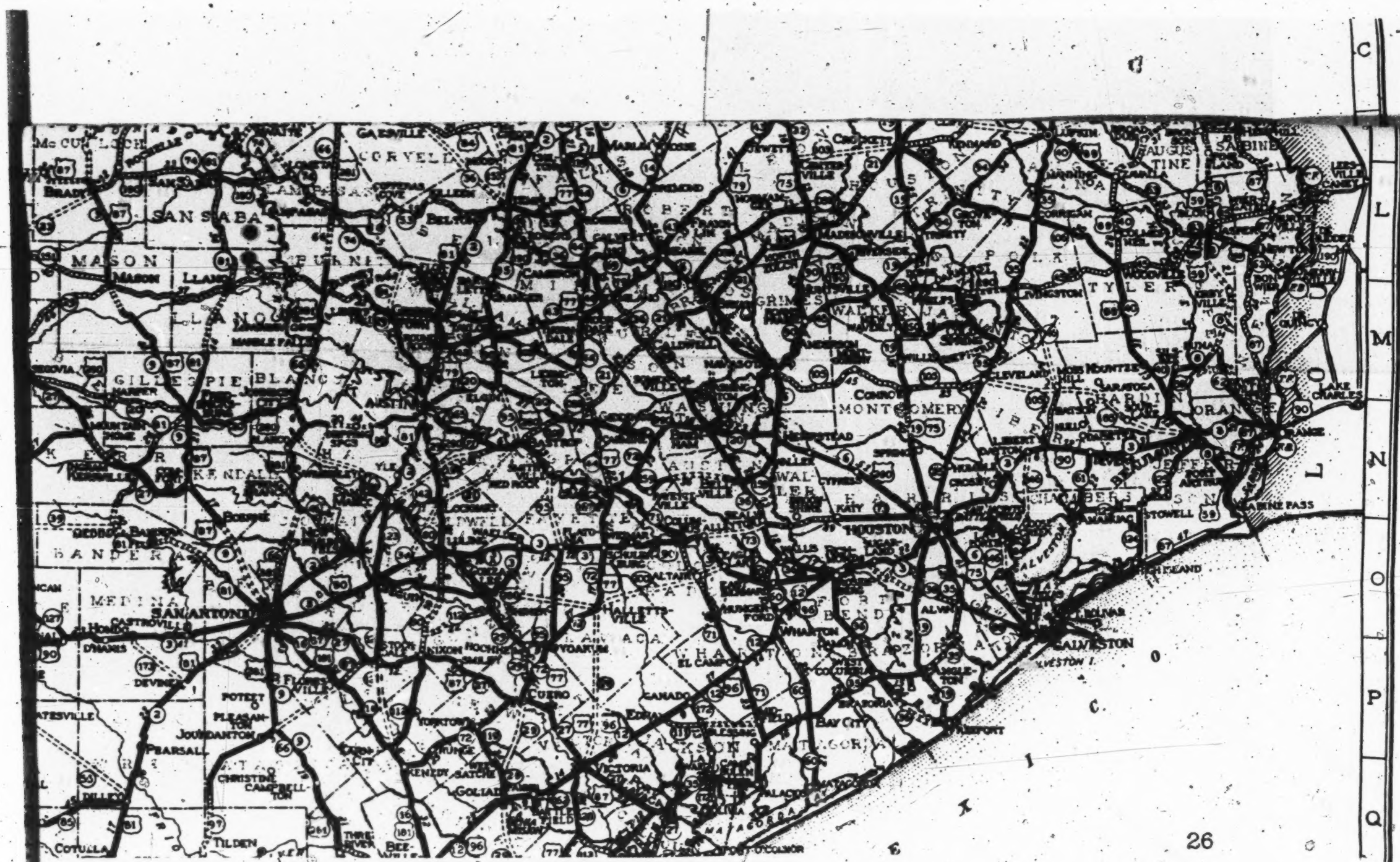
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LUFKIN
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BEAUMONT
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GALVESTON I.
BOLIVAR
PORT O'CONNOR
EL CAMPO
WHARTON
ALVIN
ANGLETON
FREEPORT
CUERO
YOAKUM
VICTORIA
KENEDY
GONZALES
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NEWTON
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26

7. Exhibit "C." Description of all other property owned and used in motor carrier service including repair shops, terminal and station facilities.

Repair shops are maintained at Waxahachie; no terminal facilities required except at Waxahachie.

If this space is not sufficient, give complete description of all property on same size sheet as this, marked Exhibit "C," indicating that fact in this space.

8. Exhibit "D." Complete route or routes over which it is desired to operate.

Attach thereto a complete and accurately printed map or plat, showing on a large scale: (1) All highways traversed, giving State Highway Numbers; (2) Give accurately and in detail the names and addresses of all transportation companies, railroad, interurban, common carrier motor carriers, and contract carriers serving all or any portion of the territory covered by this application, and (3) If this application covers all or a portion of a territory in which there is already a common carrier in operation, point out in detail the inadequacies of existing transportation facilities. Use same sized sheet of paper as this and attach to this application, marked Exhibit "D." See State Highway Department map attached, marked Exhibit "D".

9. Exhibit "E." Schedule of proposed service, showing the time for departure and arrival at terminal and way stations. Attach sheet, same size as this, showing full details, marked Exhibit "E." If this is an application for additional service, then give schedules of existing service in detail. See Exhibit "E"

10. Exhibit "F." Rates proposed to be charge" on same sized sheet as this. Attach as Exhibit "F" for the transportation of property between the several points and through rates. Rates to be approved by Railroad Commission.

R. E. McDonald
by J. S. Christopher Atty in Fact Applicant.

Dated at Austin, Texas, August 30, 1935. 19

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RAILROAD COMMISSION
Motor Transportation Division

AFFIDAVIT

State of Texas
County of Travis

I, T. S. Christopher, Attorney in fact for (Applicant), do solemnly swear that the facts stated in the foregoing application and all exhibits attached thereto are true and correct and that said statement of facts constitutes a complete statement of the matters to which it relates.

T. S. Christopher

Subscribed and sworn to before me this the 30 day of August

or a portion of a territory in which there is already a common carrier in operation, point out in detail the inadequacies of existing transportation facilities. Use same sized sheet of paper as this and attach to this application, marked Exhibit "D." See State Highway Department map attached, marked Exhibit "D".

9. Exhibit "E." Schedule of proposed service, showing the time for departure and arrival at terminal and way stations. Attach sheet, same size as this, showing full details, marked Exhibit "E." If this is an application for additional service, then give schedules of existing service in detail. See Exhibit "E"

10. Exhibit "F." Rates proposed to be charge" on same sized sheet as this. Attach as Exhibit "F'd for the transportation of property between the several points and through rates. Rates to be approved by Railroad Commission.

by: A. E. McDonald
T. S. Christopher, Atty. in fact
Applicant.

Dated at Austin, Texas, August 30, 1935. 19

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SEP. 4 1935
RAILROAD COMMISSION
Motor Transportation Division

AFFIDAVIT*

State of Texas
County of Travis

I, T. S. Christopher, Attorney in fact for (Applicant), do solemnly swear that the facts stated in the foregoing application and all exhibits attached thereto are true and correct and that said statement of facts constitutes a complete statement of the matters to which it relates.

T. S. Christopher

Subscribed and sworn to before me this the 30 day of August 1935

Erma Jones Couch

Notary Public Travis County, Texas

*If applicant is a corporation, the affidavit must be made by the president or other officer authorized by the by-laws of the corporation to act for it. If applicant is a firm or association, some member of such firm or association authorized to make such affidavit shall execute same.

(OVER)

Sec. 10. (Chapter 314, Acts of the 41st Legislature, 1929.) No application for a certificate shall be considered by said Commission unless it be in writing and set forth the following facts:

(1) It shall contain the name and address of the applicant and the names and address of its officers, if any, and shall give full information concerning the financial condition and physical properties of the applicant.

(2) The complete route or routes over which the applicant desires to operate, together with a description of each vehicle which the applicant intends to use.

(3) A proposed time schedule to be charged between the several points or localities to be served.

(4) It shall be accompanied by a plat or map showing the route or routes over which the applicant desires to operate, on which plat or map shall be delineated the line or lines of any existing transportation company or companies serving such territory, with the names and addresses of the owner or owners thereof.

[fols. 29-30] THE STATE OF TEXAS,
County of Travis:

Before me, the undersigned authority, on this day personally appeared Tilden L. Childs, who being by me duly sworn deposes and says, that he is Assistant Director of the Motor Carrier Division of the Railroad Commission of Texas, and is familiar with the records thereof, and that the foregoing 28 pages are true and correct copies of the records on file in said office.

Tilden L. Childs.

Sworn to and subscribed before me, a Notary public in and for Travis County, Texas, this the 23rd day of January, A. D. 1936. Mene Marie Johnson, Notary Public in and for Travis County, Texas. (Seal.)

[fol. 31] EXHIBIT "D"

[fol. 32] BEFORE THE RAILROAD COMMISSION OF TEXAS, MOTOR TRANSPORTATION DIVISION

Before Mr. Mark Marshall, Director, and Mr. T. L. Childs, Ass't. Director

Hearing Held Austin, Texas, May 15, 1934

Docket No. 1739

Application of A. E. McDONALD, Waxahachie, Texas, for a Certificate Authorizing the Operation of a Common Carrier Motor Carrier Service Interstate from Waxahachie to Points in Oklahoma via Dallas and Denison Over State Highway No. 6 and via Ft. Worth Over State Highway No. 34, Thence to Denton Over State Highway No. 10 and Thence to Oklahoma State Line via Gainesville Over State Highway No. 40; from Waxahachie to Galveston Over State Highway No. 75; from Waxahachie to Hillsboro Over State Highway No. 6; Thence to San Antonio Over State Highway No. 2 and Thence to McAllen Over State Highway No. 66; From Waxahachie to Galveston Over State Highway No. 6 & a to Waco Thence to Galveston via Houston Over State Highway No. 6.

[fol. 33] Appearances:

For the Applicant: Carl Phinney.

For the Protestants: H. L. Smith, for the Rail Lines affected.

Witnesses sworn.

[fol. 34] Transcript of Testimony

Mr. Marshall: We now call for hearing Docket No. 1739, being the Application of A. E. McDonald, Waxahachie, Texas, for a certificate of convenience and necessity authorizing the operation of a common carrier motor carrier service interstate, from Waxahachie to Points in Oklahoma via Dallas and Denison over State Highway No. 6 and via Ft. Worth over state Highway No. 34 thence to Denton over State Highway No. 10 and thence to Oklahoma State Line via Gainesville over State Highway No. 40; from Waxahachie to Galveston over State Highway No. 75; from Waxahachie to Hillsboro over State Highway No. 6; thence to San Antonio over State Highway No. 2 and thence to McAllen over State Highway No. 66; from Waxahachie to Galveston over State Highway No. 6 and 2 to Waco thence to Galveston via Houston over State Highway No. 6.

Mr. Smith: We agree that the testimony concerning these highways will be admitted, that the testimony in the West Texas and Texas Transit Co. et al. will apply so far as these highways are concerned, and admitted that Col. Knapp testimony will go in the record the same as in the Wald and Beard cases.

Mr. Phinney: Is that the same as in the Wald and Beard [fol. 35] cases, the same that Col. Knapp gave them, the same testimony as in the West Texas and Texas Transit Co. cases? (Docket No. 9210—West Texas Motor Freight Lines, etc. Docket No. 9186 and 1675—Wald Transfer Co. and Docket No. 1668—D. A. Beard Truck Line.)

Mr. Smith: It will be agreed that Col. Knapp will testify if he is able, and if not, then it will be the same as in the West Texas and Texas Transit cases.

Mr. Phinney: If protestants want to stand on the testimony that has been given by Col. Knapp previously as in other cases, then we can eliminate an argument with counsel. The Commission has a right to consider all of the evidence in other cases concerning the condition of the highways, it is agreeable so far as we are concerned to have that done in this case, and my agreement is to the other witnesses and is only to the citizen witnesses which testified as to the highways over which we will operate. In that connection, we offer into the record recommendations of County Judge of Ellis County, and W. S. Howard of Precinct #2, and M. C. Giles, Commissioner Precinct #3,

Tom J. Ball, District Judge, Archie D. Gray, District Attorney, W. C. Stephenson, Commissioner of Precinct #4; in which they state they have no objection for Mr. McDonald's application to be granted. I would like also to introduce the recommendation of the Mayor of Waxahachie as to his attitude as of May 14th, on this application. I have [fol. 36] some other recommendations here, one is from the Chamber of Commerce, and Retail Merchant's Association, and which I think can not properly be introduced except as correspondence. I would like to have them marked.

Mr. Smith: Col. Knapp's testimony will be the same as in the Wald and Beard cases, but there are some minor changes in the highways—for instance Waco to Hillsboro the highway has been opened there, and the testimony he gave should cover that road, and did cover it at the time it was given, but it will be given as improved in the testimony if it reflects the exact condition. He would give the testimony to cover the changes that have been made in the road if he is able to give this testimony. We want it as presented in the West Texas and Texas Transit Co. and will ask that it be as shown in those case-, and as in the Wald and Beard cases and be brought down to the most recent date possible.

Mr. Marshall: It is my idea of the law that the Commission is authorized to find out from any source the present condition. All right, let's have the testimony.

Examination of the witness A. E. McDonald, by Mr. Phinney, testimony as follows:

Q. You are A. E. McDonald?
A. Yes, A. E. McDonald.
Q. You live where?
A. Waxahachie, Texas.
[fol. 37] Q. Have you filed an application with the Railroad Commission for permit to operate as motor carrier for hire?
A. Yes, sir.
Q. What kind of application have you filed?
A. Interstate common carrier.
Q. Any body else interested in this application or your operation?
A. No, sir.
Q. You own it individually?

A. Yes, sir.

Q. The financial statement which you have filed here reflects the true condition of your finances?

A. Yes, sir.

Q. And of your assets and liabilities?

A. Yes, sir.

Q. The description of your equipment which you desire to operate—this shows you to have made application to operate three trucks, what are these trucks?

A. Two of them are ton and a half Chevrolets and the other ton and a half G. M. C.

Q. Trucks and semi trailers?

A. Yes, sir.

Q. Any of this equipment with air brakes?

—. ——.

[fol. 38] Q. The description you have set forth here as to the height, weight and length is correct as set forth in your application?

A. Yes, sir.

Q. You have made application for common carrier interstate certificate, Mr. McDonald, what do you intend to haul?

A. What I haul—interstate commerce, any commodities.

Q. What is your idea of interstate commerce, what do you mean by that?

A. Now, Mr. Phinney, interstate commerce consists of any commodities that have moved from one state to another, for instance into Texas from another state, and out of Texas to another state.

Q. Now, under this application do you desire to handle what is commonly referred to as ship side freight?

A. Yes, sir, that is when it is interstate freight.

Q. You desire to pick it up at the dock at Houston or Galveston and bring to points you set forth in your application?

A. Yes, sir.

Q. Outside of that will you transport any other commodities?

A. Under my application I would not be allowed to.

Q. Your application shows that you desire to operate over Highway No. 6 from Waxahachie to points in Oklahoma via Ft. Worth and Gainesville, when is the last time [fol. 39] you went over that highway?

A. It has been 30 days.

Q. What was the condition of that highway?

A. It is fair all the way up to the Oklahoma line, and the Oklahoma road is very good.

Q. Did you have any difficufty getting over that highway?

A. No.

Q. Experience any difficulty caused by traffic?

A. No.

Q. Is that highway in good condition?

A. Yes.

Q. From Waxahachie to Ennis what is the condition of that highway?

A. There is a distance of about 12 miles—and 8 miles of that is new concrete road, just opened, 18 feet wide and the other 4 is black top asphalt road and is smooth—it is just as smooth as the concrete.

Q. Do you have any difficulty in getting over that highway?

A. No, sir.

Q. Is the traffic using that highway heavy or light?

A. Very light.

Q. Now, when was the last time you were over it?

A. Last week.

Q. From your experience in the use of the highways would [fol. 40] you say that your operation would interfere with the public using that highway?

A. No, sir.

Q. Now, from Ennis down to Houston over Fed. No. 75 when was the last time you were over that?

A. Last Tuesday night.

Q. Generally, what is the condition of that highway?

A. You mean as to the road bed?

Q. The construction.

A. It is fine, A No. 1, with the exception of around Conroe, there is a little stretch down there that is not so good.

Q. Did you experience any difficulty due to traffic in getting over that highway?

A. Not while making that trip, we made a count of the traffic on the highway and we left Ennis at 12 o'clock at night and arrived in Houston around 6:30 the next morning, and we passed 57 vehicles coming and meeting us.

Q. That includes trucks and automobiles and wagons and that took nothing going in the opposite direction?

A. Yes, sir, everything.

Q. I notice in the application that you have asked for an alternate route from Huntsville to Navasota and then to

Houston over Highway 6, is it agreeable to you, if the Commission finds that Highway 75 between Houston and Conroe is so congested that any further use would inter-
[fol. 41] fere with the public use, would it be your intention to ask that they grant this alternate route, would that be agreeable with you then to operate from Houston to Navasota and then to Huntsville and on up 75?

A. At any time that Highway 75 is congested, I would.

Q. You ask the Commission to consider that as an alternative route at this time?

A. Yes, sir.

Q. Now, then, from Waco to Waxahachie, Mr. McDonald, what is the condition of that highway?

A. Good.

Q. Have you been over it recently, did you have any difficulty on that highway with reference to traffic?

A. None whatever.

Q. Did you have any trouble in passing vehicles on that highway?

A. Never did have any difficulty.

Q. What is the condition of Highway 6 from Waco to Navasota?

A. It is good.

Q. Have any trouble getting over that road?

A. No.

Q. It is a flat top road?

A. Yes, black top, and smooth.

Q. What would you say the condition of that highway is?

A. Fair.

[fol. 42] Q. Have you ever experienced any difficulty in getting over any of these highways, in any of the highways you have applied for?

A. No, sir.

Q. What is the condition of Highway 6 from Navasota to Houston?

A. Concrete slab.

Q. Is it good or bad?

A. It is A No. 1.

Q. Now, from Waco to San Antonio, what is the condition of that highway?

A. Well, that highway is under construction, we have a splendid road to near Temple, it is good concrete slab to near Temple, and then it is under construction and it will

probably be opened soon, and around San Marcos it is under construction there.

Q. And from San Antonio to McAllen what is the condition of that highway?

A. Perfect.

Q. Are you in the produce business in Waxahachie?

A. Yes, sir.

Q. Have you any occasion to go to the Valley to secure produce?

A. Yes, sir, I get loads of merchandise there during season.

[fol. 43] Q. And the merchandise you desire to haul back is only that merchandise you would use in your business, and would not be operating intra-state for hire?

A. No, but we have generally interstate shipments moving down there, and after we have unloaded the merchandise there we bring back produce, and thereby lowering the cost, and the savings will bring a less price that will be passed on to the ultimate consumer, the public.

Q. And it might be a shipment from points in Oklahoma you would carry to the Valley?

A. Yes, sir, or a car load distributed out of Dallas or Ft. Worth and destined to the Valley.

Q. Now, how frequently do you have your equipment inspected; concerning the mechanical devices of it?

A. I have my own garage and my own mechanic, and each trip of the truck that has been any distance, the truck is checked before it goes out and put in shape.

Q. From your experience as an operator in the past, do you think that your trucks, as equipped with air brakes, are more safe vehicles on the highway than one that is not?

A. Yes, I consider that they are considerably safer, and would recommend to the Railroad Commission or the Legislature that every motor vehicle be equipped with air brakes and just as quickly as it is possible, and I can get to it I am [fol. 44] going to equip my other equipment—all of mine—with brakes, as I consider it safer.

Q. Are you familiar with the laws of Texas concerning the number of hours the driver can operate?

A. I think so.

Q. You understand they are supposed to get 8 hours of sleep after they have driven 14 hours?

A. Well, so far I have never had any of my drivers work over 8 or 10 hours, and then they are off for 10 or 12 hours, and my understanding is that no driver can stay under the steering wheel or any where about the truck on duty for over 14 hours and then he must get away for 8 hours.

Q. And you do not mean by that sleeping in the cab or about the truck?

A. No, sir, I would consider that if he is on the truck he would be on duty.

Q. And if the Commission saw fit to grant your application you would continue to abide by all of the rules and regulations and laws of this state of Texas concerning the motor trucks operating over the highways?

A. Yes, sir.

Mr. Smith: How have you been operating?

A. Under an injunction secured from Judge Robertson in Waxahachie.

[fol. 45] Q. Have you been operating for Gillette?

A. No, not this year, but before I secured my injunction I was operating under their papers.

Q. And you operated under their injunction, and paid them part of the revenue from the operation?

A. No, sir, I paid so much for the privilege.

Q. You paid them 20 per cent?

A. I think that is my private business, Mr. Smith, it was under Mr. Gillette's operation.

Q. What kind of arrangement have you been operating under with the injunction, who have you been hauling for?

A. Everybody that had interstate freight on the highways that the injunction set out.

Q. Have any freight for the other concern—under your arrangement?

A. Sometimes.

Q. And you have been paying them commission?

A. No, sir.

Q. Then how did you get it?

A. Through friendship and service—service is the best way, Mr. Smith.

Q. What business are you engaged in?

A. Other than the truck line?

Q. Yes, sir.

A. As I stated, a while ago, I am in the wholesale fruit [fol. 46] and vegetable business.

Q. And the operation of these trucks will be, if granted, operated to supplement that business and in conjunction with it?

A. That is right.

Q. In conjunction with it?

A. Yes.

Q. And part of the time you will be handling your own fruit or produce and part of the time for hier?

A. That is correct.

Q. Now, how about the highways, you described some of them as fair, and some perfect, and some A No. 1, and by fair you mean that fair is not as good as those you described as A1, and perfect is the best class of highways?

A. Yes, sir.

Q. And perfect is from San Antonio to McAllen, how would you go from San Antonio to McAllen?

A. You go down Highway 80, I believe, you go down to Alice and there are various ways you can go from there, I move lots of stuff out of there, from the vicinity of Edinburg down in the Valley.

Q. And that perfect highway you found down there is where you go down to Alice and from there what way do you go?

A. I do not know the number of that highway, Mr. Smith, but south there to Edinburg—it is a direct line about 107 miles almost as an arrow flies, the asphalt road is smooth and almost as smooth as this floor.

[fol. 47] Q. How wide is it?

A. The pavement is 18 feet.

Q. Is the center higher than the edges?

A. Very little.

Q. Is it smooth and regular?

A. Yes, sir, from Alice on down it is, it is a good highway.

Q. And from Alice on up what about it?

A. There is some place up there on the road that is under construction, about Three Rivers, and most of that is concrete, and then you run into some asphalt.

Q. And you go through Kingsville?

A. No, sir.

Q. You do not go up there?

A. No. Sometimes we go by Kingsville in going to Houston.

Q. You do not go to Houston—I am talking about the San Antonio road. Do you go through Falfurrias from San Antonio?

A. Yes, sir, that is down below Alice.

Q. Is Kingsville between Alice and Edinburg?

A. No, sir.

Q. It is your testimony that that highway is 18 feet w an asphalt road that is fairly smooth?

A. Yes, sir.

Q. And that is your perfect highway?

A. Yes, that is all right.

[fol. 48] Q. Do you know how long that asphalt road been built?

A. No.

Q. Do you know if it is an old one or a new one?

A. No, sir, it would not make any difference as long a is in good condition at present.

Q. You testify that this road from Dallas to Denton then Gainesville as being a good highway, I will ask yo the highway leading out of Dallas County practically all way to Denton is about 14 feet asphalt road, higher in center and lower at the edges and rough?

A. It is not either an A1 or extra good road.

Q. That would be the highway from Denton on ove Gainesville?

A. It is both highways, there and from Denton back Dallas.

Q. What about from Gainesville on to the river, wha that a dirt road?

A. It is good, black top.

Q. You were not down here when these folks testi about that road?

A. No, sir, it does not make any difference, it is black I know what it is.

Q. You said that the highway from Waco to San Anto was perfect into Temple, was new construction, concrete

A. Yes.

[fol. 49] Q. And from Temple on down to San Marco fair?

A. The most of that road is asphalt road, and the asp is what I have termed as a fair road.

Q. Don't you know that for just a little beyond the t of Jarrell, there is about 6 miles of concrete 18 feet, and balance of that road is from 14 to 16 foot and is not a smo place in it from Jarrell to San Marcos except that 6 miles that true?

A. No, sir. That is not.

Q. Now, you made a trip down to Houston, you left Ennis at 12 at night?

A. Yes, sir.

Q. When did you get to Houston?

A. Next morning.

Q. And met 57 vehicles?

A. Yes.

Q. How long did it take you to drive down there?

A. From 8 to 8½ hours from Wa chachie.

Q. Did it take you that long to drive down there?

A. We were on a truck.

Q. How do you account for the fact that recently on a count that there were 6900 vehicles daily operating through the town of Huntsville on that highway?

Mr. Phinney: We object to that statement without estab-
[fol. 50] lishing as to where it came from.

Mr. Smith: Bob Andress introduced the statement in a recent case, that 6900 or 5900 vehicles daily operated there, and it was in his testimony and it was admitted into the record in the Wald case—6900 or 5900 vehicles daily.

Mr. Phinney: I am going to object to that as the Commission has evidence before them, and they can properly pass on the condition of the highway, and I think that is irrelative in this case.

Mr. Marshall: Mr. McDonald would not know what it was in the first place, you should cross examine him on what he knows and what he has testified about, and he just testified as to what he saw and not what another saw or what the other's count was.

A. I would be glad to carry you down with me some night and verify my statement, I would like to show to you that it is as I stated. The following night we only passed 102 trucks, coming back.

Mr. Smith: When was it you made that trip?

A. Last Tuesday night, tonight, a week ago.

Q. As a matter of fact there has been a lot of trucking out of Houston, but not much recently on account of the strike at the dock?

A. There has nothing been unloaded from the docks, but considerable stuff moving from the warehouses.

[fol. 51] Q. The trucking activities are not comparable at all with when they are unloading boats at Houston, and when they are not as this last week?

A. I have made lots of trips to Houston and did not notice a lot of difference.

Q. Do you only propose to operate just freight from the docks?

A. Interstate freight, if I can get it.

Q. Are you going to pick it up from the docks or warehouses?

A. The commodities that have gone into the warehouses are not interstate commerce.

Q. How long does it have to lay there before it would commence to be intra-state commerce?

A. I consider it intra-state the minute it hits the warehouse.

Q. You would not mind being limited to picking up freight at the docks?

A. That is what I am asking for.

Q. Is that in your opinion—is that what you consider from your experience as interstate freight?

Mr. Marshall: He stated that on Mr. Phinney's examination.

Mr. Phinney: We will be in favor of that being placed in the permit.

[fol. 52] Mr. Smith: Now, this financial statement—where is your homestead?

A. It is in Waxahachie.

Q. The farm, is that your homestead?

A. No, sir, that is in Limestone County.

Q. You have not listed the homestead at all on the financial statement?

A. I do not recall doing that.

Mr. Marshall: You are the first one that I have ever known that did not do that. I am glad to know that.

Mr. Smith: This farm, then, is other than the homestead, and the homestead is in Waxahachie?

A. Yes, sir, that is right.

Witness dismissed.

Mr. Marshall: Now, your case, Mr. Smith.

Mr. Smith: The statement in the record is our case. There is plenty of testimony in the other records and we will stand on that.

Case is submitted.

[fols. 53-54] STATE OF TEXAS,
County of Travis:

I, Erin Jones Couch, Reporter for the Railroad Commission of Texas, do hereby certify that the above and foregoing 22 pages constitute a true and correct record, to the best of my skill and ability, of the proceedings taken in Docket No. 1739, on May 15, 1934.

Witness my hand, this the 24th day of May, 1934.

Erin Jones Couch, Reporter, Railroad Commission of Texas.

[fol. 55] EXHIBIT "F"

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS, 98TH JUDICIAL DISTRICT

No. 54134

A. E. McDONALD

vs.

RAILROAD COMMISSION OF TEXAS et al.

To the Honorable Court Aforesaid:

Now comes A. E. McDonald, plaintiff in the above styled and numbered cause, and complains of Lon A. Smith as chairman, and C. V. Terrell, and Earnest O. Thompson as members of the Railroad Commission of Texas, and as the grounds for his complaint would respectfully show as follows unto the court, that:

I

The plaintiff is a resident of Waxahachie, Ellis County, Texas, and the defendants are each the duly elected, qualified and acting members of the Railroad Commission of Texas, and have their temporary residences in Austin, Travis County, Texas, where service of citation may be had.

II

The plaintiff, subsequent to May 15, A. D., 1934, filed with the Railroad Commission of Texas, defendants herein, an application for a certificate authorizing the operation of a common carrier, motor carrier service, interstate, from

Waxahachie, Texas to points in the state of Oklahoma, via Dallas and Denison, Texas, over State Highway No. 34, thence to Denton over State Highway No. 10, and to the Oklahoma State line via Gainesville over State Highway No. 40, and from Waxahachie to Galveston, Texas and return over Highway No. 34 to Ennis, and to Houston and Galveston over Federal Highway No. 75; and from Waxahachie to San Antonio, Texas and to McAllen, Texas over State Highways Nos. 6, 2, and 66, and from Waxahachie, Texas to Galveston, Texas over State Highways Nos. 6 and 2. In accordance with the terms of Section 11 of Article 911-B of the Motor Carrier Laws of the State of Texas, the Commission set the application of the plaintiff down for hearing at Austin, Texas on May 15, A. D., 1934 at ten o'clock A. M. At that time the application of the plaintiff was called and the hearing conducted by Honorable Mark Marshall, the Director of Motor Transportation of the Railroad Commission of Texas, defendants herein, and at that hearing, the plaintiff, appearing in person and by his attorney, caused the necessary testimony and evidence shown [fol. 56] which the Commission could intelligently act upon the application of said plaintiff. In spite of the fact that the Railroad Commission of Texas mailed ten days, exclusive of the date of mailing, before May 15, 1934, written notices addressed to the owners of existing transportation facilities serving the territory the plaintiff sought to serve, and to the Highway Commission of the State of Texas, the County Judges of the Counties, and to the Mayors of the incorporated cities and towns through which the plaintiff sought to operate, there was no one present at the hearing to protest the issuance of this certificate by the Railroad Commission of Texas, defendants herein. There was introduced at that time, recommendations from the County Judge, the District Judge, the Mayor of Waxahachie, and other leading citizens of Ellis County, to the effect that they desired to go on record as recommending to the Commission that the application of the plaintiff be granted. The Commission had this evidence, together with the testimony of the applicant, before it when it passed upon the merits of the plaintiff's application.

II

On July 14, A. D., 1934, or approximately 61 days thereafter, the plaintiff received a copy of an order entered by

the Railroad Commission of Texas denying his application. A copy of this order is attached hereto and is hereafter referred to as Exhibit "A", and is made a part of this petition for all purposes. The said order of the Railroad Commission, denying the plaintiff's application, was a mimeographed copy of what seemed to be an order that took into consideration testimony and evidence adduced at other hearings at which the plaintiff had no opportunity to appear. The order further recited "probably more than a hundred county judges, county commissioners, county attorneys, mayors, members of city councils, managers of chambers of commerce, school superintendents, newspaper editors, merchants and other citizens have testified at these hearings against the granting of additional truck permits over highways in their cities and counties." Plaintiff made application to operate three trucks in the transportation of interstate commodities only when not engaged in the transportation of his own commodities, the plaintiff being engaged in the wholesale cold-storage business in Waxahachie, Ellis County, Texas. Plaintiff would respectfully show that, subsequent to the hearing of the Wald application, the Com-
[fol. 57] mission entered its order finding that the highways over which applicant Wald was seeking to operate were in such state of repair as would withstand the traffic that applicant sought to place upon the highways and that the use that applicant Wald sought to make of the Highways of Texas would not unreasonably interfere with the use of the traveling public using these highways as applied for, for ordinary purposes.

III

Plaintiff would respectfully show that the order (Exhibit "A") as complained of herein, is unjust and unreasonable to him for the reason that there was no evidence adduced on the hearing of the application of the plaintiff before the Commission to support its order denying this certificate. At the hearing there was no one present to protest the granting of this application, and instead of having objections from county commissioners, county judges, etc., the Commission had before it recommendations requesting the Commission to grant the application of the said plaintiff.

IV

Plaintiff would further show that the order (Exhibit "A") is so arbitrary as to be beyond the exercises of reason-

able judgment and discretion vested in the Railroad Commission of Texas by the Motor Carrier Act, and that because it is beyond the exercises of reasonable judgment and discretion, the order denying the application is unjust and unreasonable to the plaintiff for the reason that if the Commission considered testimony adduced at other hearings when applicant Wald was before the Commission, then they found upon the evidence adduced at that hearing that the highways would withstand the additional traffic sought to be placed thereon, and that the applicant's trucks would not unreasonably interfere with the use the public makes of the highways for ordinary purposes.

V

Plaintiff would further show that the order denying his application for a Common Carrier, Motor Carrier Interstate Certificate is unjust and unreasonable for the reason that it was not shown by any evidence whatsoever that the highways over which applicant sought to operate were of narrow paved surfaces, and that they had become rough and uneven from traffic, or that they were used to their maximum [fol. 58] capacity by heavy traffic in moving the cotton crop. There was no evidence whatsoever adduced at the hearing of the plaintiff that rebutted the testimony of the applicant to the effect that the highways were paved, all-weather highways, and that they were in good condition, and further, that there was no evidence whatsoever of any cotton crop moved over the highways over which the applicant sought to operate. The Commission's order in denying the plaintiff's application is arbitrary, unjust and unreasonable to the plaintiff for the further reason that the Railroad Commission of Texas has denied all applications for permits to transport cotton for hire over the highways of this State, that they abused their discretionary power and authority when they refused and failed to take judicial notice of their own orders and acts.

VI

Plaintiff would further show that the order complained of is unjust and unreasonable to the plaintiff for the reason that there was no evidence whatsoever adduced at the hearing on his application for Common Carrier Certificate to the effect that the highways would not withstand the traffic plain-

tiff sought to place thereon, but that the Commission, without regard to the records of the Highway Department, and without regard to the testimony of the plaintiff and the recommendations from officials and leading citizens of Waxahachie and Ellis County, Texas to the effect that this application should be granted, arbitrarily denied the right of the plaintiff to operate, thereby rendering this order unjust and unreasonable to him.

VII

Plaintiff would respectfully show that at times he is transporting perishable commodities that will be destroyed if he is prevented from transporting them, that he is being threatened with arrest and criminal prosecution in the event he attempts to transport commodities for hire over the highways of this State, and, unless the Court grants him its gracious temporary writ of injunction, he will suffer irreparable loss, and that he has no adequate remedy at law.

Wherefore, Premises Considered, plaintiff prays that citations issue to the defendants citing them to appear and answer to this complaint, and that they appear and show [fol. 59] cause why a permanent injunction against them, enjoining and restraining them permanently, their agents, representatives, servants, and employees from molesting and in any wise interfering with the plaintiff's operation, and that this honorable court grant the Plaintiff a temporary injunction enjoining and restraining the Defendants, their agents, servants, and employees from molesting or in in any time interfering with the Plaintiffs operation of three trucks as applied for, and that upon hearing, the Court grant him its gracious writ of injunction permanently and perpetually enjoining the defendants, their agents, representatives, servants, and employees from molesting or in any wise interfering with the plaintiff's operation of an Interstate Common Carrier, Motor Carrier service over the highways he applied for, and that the order of the Railroad Commission of Texas, defendants herein, denying the plaintiff's right to operate, be set aside and held for naught, and for all other relief both general and special in law and in equity to which the plaintiff is justly entitled and forever prays.

Carl L. Phinney, Attorney for Plaintiff.

STATE OF TEXAS,
County of Travis:

Before me, the undersigned authority, on this day personally appeared Carl L. Phinney, attorney of record for plaintiff, and who, after by me being duly sworn, states that the allegations in the foregoing petition are to his best knowledge and belief true and correct.

Carl L. Phinney.

Subscribed and sworn to before me this the 24th day of July, A. D., 1934. Jas. T. Johnson, Notary Public, Travis County, Texas. (Seal.)

[fol. 60] In Chambers This the 24th Day of July, A. D. 1934.

On this day, there being presented to me the above petition, an application for a Show Cause Order requiring the defendants to appear and show cause why a permanent injunction should not be granted, and it appearing from the allegations contained in the plaintiff's petition that his application for a Show Cause hearing should be granted, it is therefore accordingly ordered that the Clerk of this Court issue forthwith, a Show Cause Order requiring the defendants to appear on the 27th day of July, A. D., 1934, at ten o'clock A. M., to show cause why a permanent injunction should not be granted against them.

J. D. Moore, Judge Presiding.

[fol. 61] "Exhibit A"

Order Denying Interstate Common Carrier Certificate

Railroad Commission of Texas

Motor Transportation Division

Motor Carrier Docket No. 1739

Application of A. E. McDONALD, Waxahachie, Texas, for a Certificate Authorizing the Operation of a Common Carrier Motor Carrier Service Interstate from Waxahachie to Points in Oklahoma via Dallas and Denison Over State Highway No. 6 and via Fort Worth Over State Highway No. 34 Thence to Denton Over State Highway No. 10 and Thence to Oklahoma State Line via Gainesville Over State Highway No. 40 From Waxahachie to Galveston

Over State Highway No. 34 to Ennis Thence to Houston and Galveston Over Federal Highway No. 75; from Waxahachie to Hillsboro Over State Highway No. 6 Thence to San Antonio Over State Highway No. 2 and Thence to McAllen Over State Highway No. 66; from Waxahachie to Galveston Over State Highway No. 6 and 2 to Waco Thence to Galveston via Houston Over State Highway No. 6.

Austin, Texas, July 14, 1934.

Opinion & Order

By the Commission:

On May 15, 1934, the above styled application was submitted to the consideration of the Railroad Commission in its Hearing Room in the Capitol in Austin, Texas, pursuant to notices having been issued and filed herein to all interested parties as well as the public in general according to law.

On 14th day of July 1934, the Railroad Commission took up for consideration the above styled application and after duly considering the facts, the law and its own rules and regulations reaches the following conclusion to-wit:

[fol. 62] The Commission has had before it during the last few months a number of applications of the same nature as this, in which the applicants have asked for the privilege of using many of the principal highways of the state in the same manner as this applicant. In order for the Commission to determine whether, in its opinion, certain highways of this state are carrying all of the truck traffic that can be safely entrusted on said highways without unreasonably interfering with the use thereof by the general public, the Commission has held a number of hearings in various portions of the state in order that local officials, who are familiar with the condition of the highways in their respective localities and the amount of traffic that such highways are forced to carry, might be able to testify under oath concerning the same. Probably more than a hundred County Judges, County Commissioners, County Attorneys, Mayors, Members of the City Councils, Managers of Chambers of Commerce, School Superintendents, newspaper editors, merchants and other citizens have testified at these hearings against the granting of addi-

tional truck permits over highways through their cities and counties.

Many of these witnesses whose characters and reputations were not questioned and whose interests were apparently unselfish, have testified that owing to the fact that heavy truck traffic, and especially at night, makes the highways leading into the larger centers of population so dangerous that such citizens are afraid to use the highways as much as they otherwise would. Some witnesses testified that if business called them to Houston, Dallas, or other large cities and they were unable to conclude their business before dark they spent the night in such cities rather than risk themselves upon the highways after night. Many of these officials and citizen witnesses testified that they themselves and many of the citizens of their communities were deprived of the use of some of the principal highways by reason of heavy traffic over said highways leading to aforesaid, centers of population, and that they would use the highways more, especially at night, were it not for the fact that truck traffic thereon caused such hazardous conditions that made them fear for their lives and limbs.

The evidence of these hearings showed conclusively that seasonable movements cause wide fluctuation of traffic. When crops proceed to market, truck traffic, especially, is greatly increased. Such crops, of course, vary in different sections of the state but when being marketed they naturally cause business in all lines to expand during the movement. This state often produces five or six million bales of cotton annually and the bulk of this movement occurs during the period from September through the following four months. Dallas is one of the largest inland cotton concentration points in the world, while Houston and Galveston are two of the principal cotton shipping ports. Hundreds of thousands of bales of cotton have, in the past, moved by truck over the highways between Dallas and Houston while still many more bales passed through the State of Texas from points in Oklahoma and Arkansas destined for these port cities. It is true that business conditions over the country have slowed down truck and other traffic to some extent but the Commission has received a mandate from the Legislature to not only take into consideration present burdens but also future burdens which the state highways will be called upon to assume. Certificates or permits granted by the Commission are more or less of a permanent nature so

long as the holders thereof comply with the law and with the rules and regulations of the Commission; therefore, to grant a certificate or permit during a light season or during a temporary business depression would result in adding traffic burdens to highways during busy seasons or when business conditions again return to normalcy. It is only natural to assume that the population of Texas will continue to increase and that with such increased population the highways will be called upon to assume more and more truck and motor traffic of various kinds. The fact that truck [fol. 63] traffic uses the highways to the maximum at night only adds to their hazards and these hazards are magnified in the case of those citizens whose duties prevent them from enjoying the highways for recreation purposes during daylight hours and who, perhaps, are not expert drivers at night. The large toll of deaths and injuries on the most highly improved highways, in which trucks are involved, leads the Commission to place even more credence to the evidence gathered at the hearings for the purpose of ascertaining the condition of such highways, and is cumulative of the testimony of the many disinterested citizen witnesses and officials, that these highways are already carrying as much or more truck traffic than is reasonably safe for the general public.

Portions of many of the principal highways contain narrow paving surfaces that become rough and uneven from traffic and whose dirt shoulders present unusual hazards, especially during fall, winter and spring, which are rainy seasons, and when they are used to their maximum by heavy traffic in moving the cotton crop. The evidence conclusively showed that it was impossible for an ordinary passenger car and a truck of the width permitted under the general laws of this state to pass each other upon the roads of this character without one or both of such vehicles being compelled to traverse the dirt shoulder. It was further shown that trucks, by reason of their weight, were more jealous of holding the center of the road during wet weather than at other times as they were likely to become more unmanageable when turning out upon the wet dirt shoulders and this naturally adds to the hazards of the citizens using the highways for pleasure or in the ordinary pursuit of their business.

While the Commission has not attempted to assume jurisdiction over truck operations through incorporated cities

and towns, the evidence has shown that usually the principal and often the only improved street is the one over which practically all of the through truck traffic flows. Other unimproved streets in many of the smaller cities and towns could not possibly carry this heavy traffic without being practically destroyed. These cities and town- are financially unable to properly police traffic and it would prove ruinous for them to be called upon to assume the burden of reconstructing their streets if the latter are destroyed by traffic. In many instances schools, churches, business houses and gins are located alongside of or closely adjacent to the state highway and it is necessary for citizens and children to use these highways daily, and they should not be called upon to risk their lives and limbs by having placed upon these highways such additional traffic as would unreasonably interfere with their use by such citizens and children.

There are at this time some five hundred trucks authorized to be operated out of Dallas as common carriers and one hundred and twenty-two trucks as contract carriers, while there are some four hundred common carriers operating out of Houston and fifty or sixty contract carrier trucks. In addition there are several hundred special commodity trucks operating out of Dallas and Houston, engaged in the transportation of various commodities but principally that of oil field equipment. In addition to these motor carrier trucks, the Highway Department records show that more than 120,000 trucks, 19,000 trailers and 883,000 passenger cars had been registered by that Department up to about the middle of May of this year.

[fol. 64] It is Therefore, Ordered, Adjudged and Decreed by the Railroad Commission of Texas, that the application of A. E. McDonald, Waxahachie, Texas, for a certificate authorizing the operation of a Common Carrier Motor Carrier Service Interstate from Waxahachie to point- in Oklahoma via Dallas and Denison over State Highway No. 6; and via Fort Worth over State Highway No. 34, thence to Denton over State Highway No. 10, and thence to Oklahoma State Line via Gainesville over State Highway No. 40; from Waxahachie to Galveston over State Highway No. 34 to Ennis thence to Houston and Galveston over Federal Highway No. 75; From Waxahachie to Hillsboro over State Highway No. 6, thence to San Antonio over State Highway No. 2 and thence to McAllen over State Highway No. 66;

From Waxahachie to Galveston over State Highway No. 6 and 2; Waco thence to Galveston via Houston over State Highway No. 6, be and the same is hereby denied. This order subject to the further orders of the Railroad Commission.

Railroad Commission of Texas, —— ——, Chairman; C. V. Terrell, Ernest O. Thompson, Commissioners.

Attest: C. R. McNamee, Acting Secretary.

VBG:s.

(Endorsed:) No. 54134. A. E. McDonald vs. Railroad Commission of Texas, et al., Plaintiff's original petition. Filed in the 98th District Court of Travis County, Texas, July 24, 1934. Geo. H. Templin, District Clerk, by Jas. T. Johnson, Deputy.

[fol. 65] THE STATE OF TEXAS,
County of Travis:

I, Geo. H. Templin, Clerk of the District Courts within and for the State and County aforesaid, do hereby certify that the within and foregoing is a true and correct copy of Plaintiff's Original Petition in Cause No. 54134, wherein A. E. McDonald is Plaintiff and Railroad Commission of Texas, et al. are Defendants, as the same appears on file and of record in this office.

Given under my hand and seal of office, at Austin, Texas, this the 21st day of January, 1936.

Geo. H. Templin, Clerk, District Courts, Travis County, Texas, by Geo. W. Bickler, Deputy. (Seal.)

[fol. 66] EXHIBIT "G"

IN THE 98TH DISTRICT COURT OF TRAVIS COUNTY, TEXAS

No. 54,134

A. E. McDONALD

vs.

RAILROAD COMMISSION OF TEXAS et al.

Now comes the defendant Railroad Commission of Texas, composed of Lon A. Smith, as Chairman, and C. V. Ter-

rell and Ernest O. Thompson as members thereof, and for answer to the plaintiff's original petition herein filed says:

I

Defendant demurs generally to the plaintiff's petition and says the same is insufficient in law to require it to answer and should be dismissed, and of this defendant prays judgment of the court.

II

Denying each and every allegation of the plaintiff's petition contained and demanding strict proof thereof, defendant puts itself upon the country.

III

And for further answer herein, if such be necessary, but without waiving the foregoing exceptions, either general or special, and still insisting upon the same, defendant says:

1. Defendant specifically denies that the order complained of by the plaintiff is in any way unjust or unreasonable, [fol. 67] and also specifically denies that its order is not supported by the evidence introduced before the defendant at the hearing upon plaintiff's application for a certificate to operate in interstate commerce, but asserts that the order is in all things just and reasonable and supported by the evidence.

Wherefore, defendant prays that the injunction sought, together with all other relief sought, be in all things denied, and that it be discharged with its costs.

James V. Allred, Attorney General of Texas; T. S. Christopher, Assistant Attorney General, Attorneys for the Defendant, Railroad Commission of Texas.

(Endorsed:) No. 54,134. In the 98th District Court of Travis County, Texas. A. E. McDonald vs. Railroad Commission of Texas et al. Defendant's Original Answer. Filed in the 98th District Court of Travis County, Texas, November 14, 1934. Geo. H. Templin, District Clerk, by Jas. T. Johnson, Deputy.

[fol. 68] THE STATE OF TEXAS,
County of Travis:

I, Geo. H. Templin, Clerk of the District Court within and for the State and County aforesaid, do hereby certify that the within and foregoing is a true and correct copy of Defendant's Original Answer in Cause No. 54,134, wherein A. E. McDonald is Plaintiff, and Railroad Commission of Texas et al. are Defendants, as the same appears on file in this office.

Given under my hand and seal of office, at Austin, Texas, this the 21st day of January, 1936.

Geo. H. Templin, Clerk, District Courts, Travis County, Texas, by Geo. W. Bickler, Deputy. (Seal.)

[fol. 69] EXHIBIT "H"

IN DISTRICT COURT, TRAVIS COUNTY, TEXAS

November 14, 1935

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS, 98TH JUDICIAL DISTRICT.

No. 54134

A. E. McDONALD

vs.

RAILROAD COMMISSION OF TEXAS et al.

On this, the 14th day of November, A. D., 1934, came on to be heard the above styled and numbered cause, and came the plaintiff and defendants in person and by their attorneys and announced ready for trial, and the jury having been waived, all matters of fact, as well as of law, were submitted to the Court; and the Court, after hearing the pleadings, the evidence and the arguments of the counsel, is of the opinion that both the law and the facts are with the plaintiff and that the plaintiff should recover and have judgment for the relief as pleaded for in the petition.

It is, therefore, Ordered, Adjudged and Decreed that the plaintiff, A. E. McDonald, do have and recover from and of the defendants all of the relief as prayed for in its original petition, and that the temporary injunction, here-

tofore granted in this cause, shall be made permanent and perpetual and the said temporary injunction, as heretofore issued, is hereby in all things made permanent and perpetual, and the defendants, their agents, representatives, servants and employees are hereby now permanently and perpetually enjoined from arresting or in any manner causing to be arrested the plaintiff or any of its agents, representatives, servants or employees, from in any manner interfering with the plaintiff, its agents, representatives, servants and employees while operating a common carrier motor carrier service transporting commodities moving in interstate commerce over the following highways, to-wit: From Waxahachie, Texas to points in the state of Oklahoma via Dallas and Denison, Texas over State Highway No. 34 to Ennis, and over Federal Highway No. 75 from Ennis to Dallas, and over Highway No. 6 from Waxahachie to Dallas, and from Dallas to the Texas-Oklahoma State Line via [fol. 70] Sherman and Denison, Texas over Federal Highway No. 75, and from Dallas to the Texas-Oklahoma State Line via Gainesville over Federal Highway No. 77 and return to Waxahachie; from Waxahachie to Ennis, Texas over State Highway No. 24, and from Ennis to Houston and Galveston over Federal Highway No. 75 and return; and from Houston to San Antonio and return over State Highway No. 3; and from Waxahachie to San Antonio, Texas to McAllen, Texas over State Highways Nos. 6, 2, and 66 and return; and from Waxahachie, Texas to Waco, Texas to Galveston, Texas over State Highway No. 6 and No. 2 and return, and serving the cities and towns along such highways.

It is, therefore, Ordered, Adjudged and Decreed that the plaintiff, under the permanent injunction, shall be entitled to operate three (3) trucks to be in interstate commerce only. The plaintiff shall be entitled to transport commodities from one point of Texas to another point in Texas along the highways as hereinbefore set out provided the commodities so transported shall be moving in interstate commerce.

It is further Ordered, Adjudged and Decreed that the defendants, their agents, servants, representatives or employees are further permanently and perpetually enjoined from interfering with the plaintiff, his agents, servants, representatives or employees in the operation of the number of trucks, as hereinbefore set out, for failure to have displayed on the plaintiff's trucks the Railroad Commis-

sion's identification plates and tags. Provided, however, that if the Railroad Commission of Texas, defendant herein, shall hereinafter, in accordance with the terms of this judgment, issue a certificate of convenience and necessity authorizing the operation of a motor carrier service interstate in all respects as applied for, and shall permit the plaintiff to operate under the terms of the certificate, and shall issue to the plaintiff all necessary plates, identification tags and cards, that then and in that event this injunction may be dissolved or considered void and of no further force and effect. Provided, however, that the plaintiff herein [fol. 71] shall operate under this injunction subject to all other provisions of the law applicable to plaintiff save and except the requirement for a certificate of convenience and necessity and subject to all lawful orders, rules and regulations of the Railroad Commission, save and except the requirement for a certificate of convenience and necessity. That all costs of this suit be and they are hereby taxed against the plaintiff for which the officers of this Court may have their execution. To the Order, Judgment and Decree of the Court, the defendant then and there in open court excepted and gave notice of appeal to the Third Court of Appeals at Austin, Texas.

W. F. Robertson, Judge Presiding.

(Endorsed:) No. 54134. In the District Court of Travis County, Texas, 98th Judicial District. A. E. McDonald vs. Railroad Commission of Texas, et al. Judgment. Filed in the 98th District Court of Travis County, Texas, November 14, 1934. Geo. H. Templin, District Clerk, by Jas. T. Johnson, Deputy.

[fol. 72] The State of Texas,
County of Travis:

I, Geo. H. Templin, Clerk of the District Courts within and for the State and County aforesaid, do hereby certify that the within and foregoing is a true and correct copy of Judgment in Cause No. 54134, wherein A. E. McDonald, is Plaintiff and Railroad Commission of Texas, et al. are Defendants, as the same appears on file and of record in this office.

Given under my hand and seal of office, at Austin, Texas, this the 21st day of January, 1936.

Geo. H. Templin, Clerk, District Courts, Travis County, Texas, by Geo. W. Bickler, Deputy. (Seal.)

[fol. 73] EXHIBIT "I"

No. 8284

RAILROAD COMMISSION et al., Appellants,

vs.

A. E. McDONALD, Appellee

From District Court of Travis County

Appellee, McDonald, applied to the Railroad Commission for a motor carrier permit to operate trucks over several cardinal highways in Texas in hauling what he designated as interstate commerce, though his application shows that he contemplated carriage of freight almost entirely within the State. His application was heard by the Commission on May 15, 1934, and was by the Commission denied on July 14, 1934. The order of the Commission denying the permit found numerous facts as to the use of the highways generally by trucks, including several of the highways on which McDonald proposed to operate in and about designated cities, the injuries such operations would inflict upon portions of such highways, the dangers to the traveling public thereon occasioned by such operations, and refused the permit, obviously on the ground that, as to at least portions of the highway sought to be used such operation would place an undue burden upon the physical properties of the highways themselves, would endanger public safety, and would interfere with the use thereof by the public.

Appellee appealed from such order by filing suit in the District Court of Travis County to enjoin the Commission and its enforcement officers from interfering with his operations over the routes applied for, on the ground that the Commission's order was arbitrary, unjust and unreason-[fol. 74] able as to him and without evidence to support it. A temporary injunction was granted as prayed for and upon hearing was made permanent, from which judgment the Commission prosecutes this appeal.

Appellee's place of business was at Waxahachie, Texas. His application sought a permit to operate from there to Oklahoma through Dallas, Denton, Gainesville and Denison, over State Highways 34, 10 and 40; from Waxahachie to Galveston via Ennis over State Highway 34; thence over Federal Highway 75 through Corsicana, Huntsville and Hous-

ton, and to the same point over State Highways 6 and 2 to Waco, and Highway 6 from there to Houston via Bryan and Hempstead; from Waxahachie to McAllen over Highway 6 to Hillsboro, thence over Highway 2 to San Antonio, thence over Highway 66 to McAllen.

Trial was to the court without a jury. The original evidence introduced on the trial of this case was meagre; but by agreement of counsel, and with the approval of the trial court, there was introduced in evidence a transcript of the testimony heard by the Railroad Commission on McDonald's application, and that heard by the Commission on the application of Wald Transfer & Storage Company, on January 15-17, 1934, for a permit to operate trucks over and upon several of the same highways involved in McDonald's application, with the agreement that the facts therein shown should be considered by the trial court in this case; and further that in the hearing before the Commission, the evidence offered in the Wald application should be considered by the Commission in passing upon McDonald's application. There was also introduced in evidence the order of the Railroad Commission granting to Wald, on March 29, 1934, the permit applied for. It was also agreed that the Commission had reconsidered and reopened the Wald case, and that [fol. 75] same was still pending at the time of the trial hereof.

Upon application, the trial court filed findings of fact and conclusions of law. These findings are first attacked upon this appeal. The first finding of the trial court complained of is, "that there was present at the hearing (before the Railroad Commission) only the applicant, and that there was no testimony introduced protesting the granting of this certificate." This finding cannot be sustained. The statement of facts shows that counsel appeared before the Commission at the hearing on McDonald's application, made agreements with his counsel as to evidence the Commission should consider on that hearing, and as to material facts relating to same. Among other things, that the Commission should consider at that hearing the testimony offered at hearings before the Commission on applications made by Beard and by Wald Transfer & Storage Company to operate trucks over the same highways, the transcript of the evidence in the Wald hearing being brought up as an exhibit and a part of the record in the instant case. In the Wald

hearing several protestants appeared, the hearing lasted three days, and extensive evidence was introduced relating to the condition of the various highways, protests of various citizens against such permits, congested traffic conditions, dangers and inconvenience to the public using such highways caused by such truck operations, and damages to sections of such highways caused by truck operations. These matters all thus being made by agreement a part of the record in the instant case and it being agreed that the trial court should so consider them, it affirmatively appears that this finding by the trial court was erroneous.

[fol. 76] The trial court also found as a fact that such operation by appellee over such highways would not unreasonably interfere with the use thereof by the public; that such use by appellee would not put upon the highways themselves any present or future undue burden on the physical properties thereof, because appellee was already using same in conducting his private business; that the Commission did consider, in passing upon appellee's application, the testimony heard by it in the Wald case; and that it did grant Wald such permit.

While the testimony adduced in the Wald case was perhaps sufficient, if the order of the Railroad Commission be disregarded, to sustain an independent finding of the trial court of the facts recited as to burdens upon the highways and interference with the use thereof by the public, this is not the test to be applied in appeals from orders of the Commission entered after proper hearing and consideration. The test is, not what the court's independent judgment might be, but whether there was substantial evidence before the Commission to sustain its order. Regulation of the use of the public highways is not delegated by law to the courts, but is expressly delegated to the Commission, and the only pertinent inquiry in an appeal to the court is whether the Commission has legally exercised the power granted to it. The statutes (Art. 911a and 911b, Vernon's Ann. Stat.) as variously amended, prescribe at length and in detail the powers and duties of the Commission with respect to such regulation. So long as the Commission exercises such supervision reasonably and in conformity with the statute, their orders should be given a high degree of verity, and unless clearly illegal or arbitrary should not be stricken [fol. 77] down. Shupee v. Railroad Commission, 57 S. W. (2d), 295; aff. by Supreme Court in 73 S. W. (2d) 505, 123

Tex. 517; Texas Motor Coaches v. Railroad Commission, 59 S. W. (2d), 923; aff. by Supreme Court in 73 S. W. (2d), 511.

As a basis for, and as a part of, the Commission's order attacked in the instant case, and in compliance with Sec. 13, Chap. 277, Acts Reg. Ses. 42nd Leg., 1931, which requires the Commission, where an application is contested, to "file a concise written opinion setting forth the facts and grounds for its action," the Commission made and filed rather extensive findings. We quote excerpts therefrom, as follows:

"The Commission has had before it during the last few months a number of applications of the same nature as this, in which the applicants have asked for the privilege of using many of the principal highways of the State in the same manner as this applicant. In order for the Commission to determine whether, in its opinion, certain highways of this state are carrying all of the truck traffic that can be safely entrusted on said highways without unreasonably interfering with the use thereof by the general public, the Commission has held a number of hearings in various portions of the state in order that local officials, who are familiar with the condition of the highways in their respective localities and the amount of traffic that such highways are forced to carry, might be able to testify under oath concerning the same. Probably more than a hundred County Judges, County Commissioners, County Attorneys, Mayors, Members of the City Councils, Managers of Chambers of Commerce, School Superintendents, newspaper editors, merchants and other citizens have testified at these hearings against the granting of additional truck permits over highways through their cities and counties."

"Some witnesses testified that if business called them to Houston, Dallas, or other large cities and they were unable to conclude their business before dark they spent the night in such cities rather than risk themselves upon the highways after night. Many of these officials and citizens of their communities were deprived of the use of some of the principal highways by reason of the heavy traffic over said highways leading to aforesaid centers of population, and that they would use the highways more, especially at night, were it not for the fact that truck traffic thereon caused such hazardous conditions that made them fear for their lives and limbs."

[fol. 78] "Dallas is one of the largest inland cotton concentration points in the world, while Houston and Galveston are two of the principal cotton shipping ports. Hundreds of thousands of bales of cotton have, in the past, moved by truck over the highways between Dallas and Houston while still many more bales passed through the State of Texas from points in Oklahoma and Arkansas destined for these port cities."

"The fact that truck traffic uses the highways to the maximum at night only adds to their hazards and these hazards are magnified in the case of those citizens whose duties prevent them from enjoying the highways for recreation purposes during daylight hours and who, perhaps, are not expert drivers at night. The large toll of deaths and injuries on the most highly improved highways, in which trucks are involved, leads the Commission to place even more credence to the evidence gathered at the hearings for the purpose of ascertaining the condition of such highways, and is cumulative of the testimony of the many disinterested citizens, witnesses and officials, that these highways are already carrying as much or more truck traffic than is reasonably safe for the general public."

"The evidence conclusively showed that it was impossible for an ordinary passenger car and a truck of the width permitted under the general laws of this state to pass each other upon the roads of this character without one or both of such vehicles being compelled to traverse the dirt shoulder. It was further shown that trucks, by reason of their weight, were more jealous of holding the center of the road during wet weather than at other times as they were likely to become more unmanageable when turning out upon the wet dirt shoulders and this naturally adds to the hazards of the citizens using the highways for pleasure or in the ordinary pursuit of their business."

"In many instances schools, churches, business houses and gins are located alongside of or closely adjacent to the state highway and it is necessary for citizens and children to use these highways daily, and they should not be called upon to risk their lives and limbs by having placed upon these highways such additional traffic as would unreasonably interfere with their use by such citizens and children.

"There are at this time some five hundred trucks authorized to be operated out of Dallas as common carriers and one hundred and twenty-two trucks as contract car-

riers, while there are some four hundred common carriers operating out of Houston and fifty or sixty contract carrier trucks. In addition there are several hundred special commodity trucks operating out of Dallas and Houston, engaged in the transportation of various commodities but principally that of oil field equipment."

[fol. 79] The statute likewise makes this opinion of the Commission admissible in evidence on an appeal from its order. Such findings of fact, therefore, by the Commission, set out as a part of its order, are entitled to the same degree of verity as the order itself. While the findings above quoted are general in many respects, and based upon hearings of other applications than that of McDonald, it affirmatively appears that they are applicable to the cities and highways through and over which McDonald sought to operate. We do not understand, nor do we think the Legislature ever contemplated, that the Railroad Commission should be required, each time an applicant sought a permit to use a state highway for commercial purposes, to conduct extensive hearings over and over again, as to the condition of such highway, the traffic thereon, and the public convenience in the use of such highway. When these facts are ascertained by the Commission, as related to cardinal public highways of the State, in the absence of a showing that conditions have changed thereon since the ascertainment of such facts, the Railroad Commission may properly act upon applications for permits to operate upon such highways, based upon the facts and conditions relative to such highways theretofore properly and adequately obtained, without the necessity of detailed proof thereof on each and every application presented to it. Its findings with reference thereto, as recited in its orders, will be presumed to have been supported by competent evidence, unless the contrary is made to appear upon an appeal from its order.

From the trial court's finding and from argument presented in appellee's brief, we infer that the judgment of the trial court was based largely upon the fact shown that the Commission had granted on March 29, 1934, to Wald [fol. 80] Transfer & Storage Company a permit to operate over the same highways as a motor carrier. It is agreed, however, that the Commission had the Wald application under reconsideration at the time of the trial. We have read the testimony brought up as a part of this record which was

heard by the Commission on Wald's application. It is unnecessary to detail it here. It was clearly sufficient to have authorized the Commission to deny Wald's application; and the fact that the Commission had, after granting such application, reconsidered and reopened the Wald case, might indicate that such was its purpose. Regardless of that, however, that testimony was sufficient to show not only prospective injury to portions of such highways as a result of added burdens on same; but an added safety hazard to the traveling public, and public inconvenience as well. It is to be noted also that McDonald's application was not heard until after that of Wald Transfer & Storage Company had been acted upon. The Commission could, therefore, have found, even if Wald be permitted to operate, that any additional operations over such highways would result in damage to the highways and dangers and inconvenience to the public. Such was its prerogative. The mere granting of one permit to a motor carrier over the highway is no evidence that another applicant is entitled to be granted such privilege over the same highway. The use made of it by the first permittee may be all that the public convenience and public safety will permit. And if, in the opinion of the Commission, based upon substantial evidence, the operations of Wald over such highways, even if his permit is not revoked, increased the traffic thereon as much as the public convenience and public safety would war- [fol. 81] rant, it was the function and duty of the Commission to deny McDonald's application, though it had already granted that of Wald to operate upon the same highways. The use of the public highways for profit by an individual is not a matter of right but a mere privilege, subordinate at all times to the use thereof by the public. No question as to rates on interstate operation is here involved, and no discrimination as between permittees. The power of the Commission herein exercised obviously was not an attempt to regulate interstate commerce, but a legitimate exercise of the police power of the State in the use of its highways with regard to the preservation thereof and the safety and convenience of the public. The effect on interstate commerce was, therefore, but incidental. Under these circumstances the State is not denied by the Federal Constitution the power to regulate the use of its property in the interest of public safety and public convenience, even though in doing so such regulation incidentally affect inter-

state operations of such trucks upon its highways. See Bradley v. Public Utilities Com., 289 U. S. 92, 77 L. Ed. 1053, 85 A. L. R., 1131; Continental Baking Co. v. Woodring, 286 U. S. 352, 76 L. Ed. 1155, 81 A. L. R. 1402; Stephenson & Binford, 287 U. S. 260, 77 L. Ed. 292; Texport Carrier Corp. v. Smith, 8 Fed. Sup. 28; Wald Transfer & Storage Co. v. Smith, 4 Fed. Sup. 61.

All of the matters here presented were passed upon and determined prior to the passage and effective date of what is known as the Federal Motor Carrier Act of 1935, effective August 9, 1935, and we have not taken that Act into consideration in determining the issues here presented.

[fol. 82] Having reached the conclusion that the record presented shows that the order of the Railroad Commission, and the findings made by the Commission, as provided for in Sec. 12, Chap. 277, Acts Reg. Ses., 42nd Leg., were based upon substantial evidence; and that the order is not unreasonable nor arbitrary as to appellee, the judgment of the trial court is reversed and the injunction granted is in all things dissolved.

J. H. Baugh, Associate Justice.

Reversed and Injunction Dissolved.
Filed: January 8, 1936.

[fol. 83] Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas

I, R. E. Moore, Clerk of the Court of Civil Appeals of the Third Supreme Judicial District of the State of Texas, hereby certify that the foregoing ten pages contain a true and correct copy of the opinion filed in said court on the 8th day of January, 1936, in the following numbered and entitled cause, towit: No. 8284, Railroad Commission of Texas et al. vs. A. E. McDonald, on appeal to said court from Travis County, Texas.

Witness my hand and the seal of said Court, this the 20th day of Jany., A. D. 1936.

R. E. Moore, Clerk. (Seal Court of Civil Appeals of the State of Texas.)

FILE COPY

FILED
MAY 21 1938
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. [redacted] 55

A. E. McDONALD,

Petitioner,

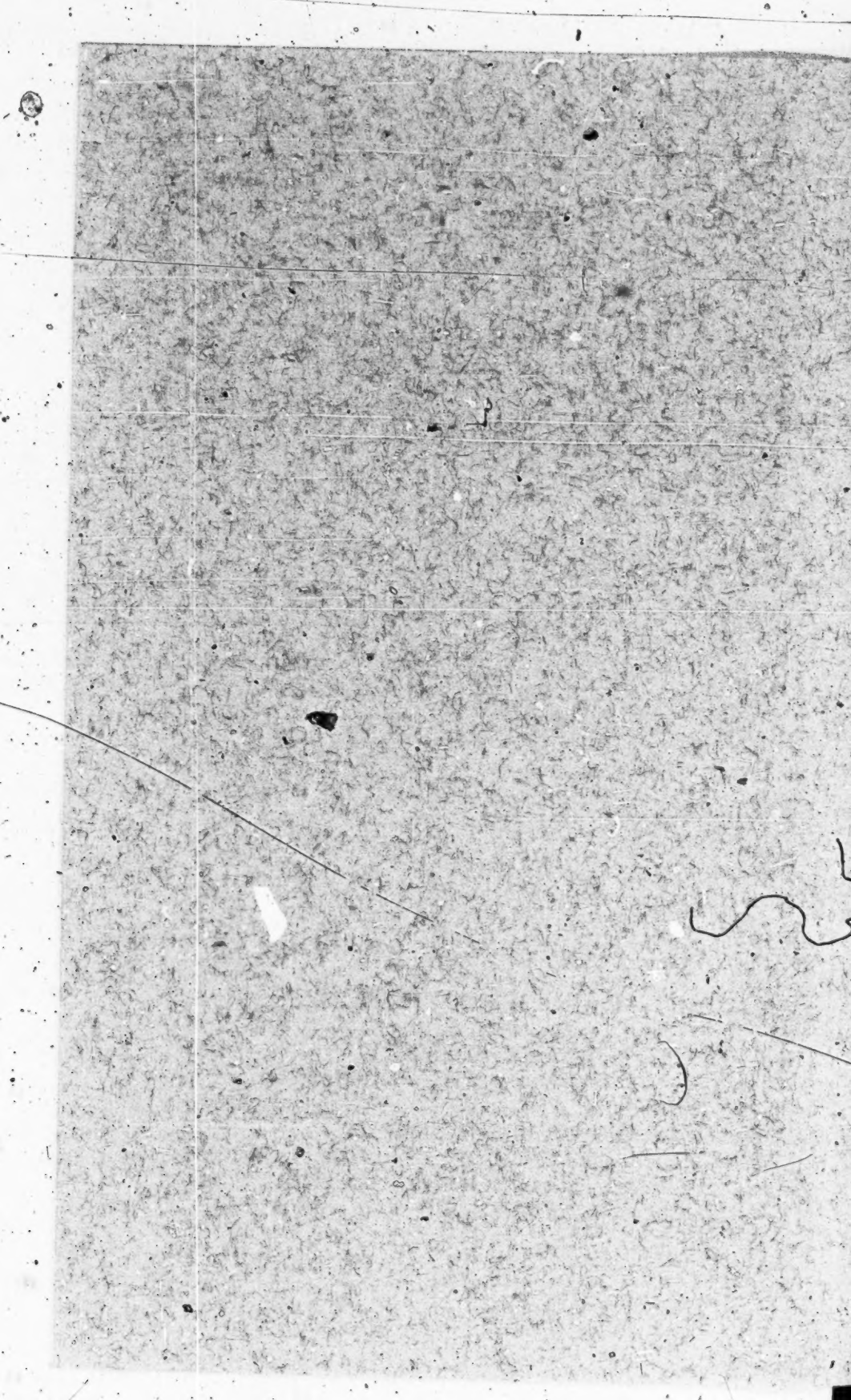
vs.

ERNEST O. THOMPSON ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

T. S. CHRISTOPHER,
LLOYD E. PRICE,
Counsel for Petitioner.

LYNN B. GRIFFITH,
PRICE AND CHRISTOPHER,
Of Counsel.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 1052

A. E. McDONALD,

Petitioner,

vs.

ERNEST O. THOMPSON ET AL.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of A. E. McDonald respectfully shows to this Honorable Court:

I.

Summary Statement of the Matters Involved.

Petitioner is a common carrier motor carrier, having been engaged in such business since long prior to passage of Motor Carrier Act, 1935 (R. 4-23-35).

Respondents are the Railroad Commission of Texas and its law enforcement officers (R. 2).

On June 1, 1935 and prior thereto petitioner was operating over Federal Highways Nos. 75, 77, 80, 81, 90, 281, and 290 (R. 36) within the State of Texas, exclusively in interstate commerce (R. 5-35) and has continuously so engaged since said date.

Motor Carrier Act, 1935, was approved by the President of the United States August 9, 1935, under the so-called "Grandfather" provision of which (Section 206a) petitioner was and is entitled to a certificate of convenience and necessity as a matter of right upon filing application and proof of operation on June 1, 1935 and continuously since. Application was filed as required by Act (R. 36). Petitioner had met all requirements of Federal Act to date of trial in District Court (R. 36) and all requirements of State law (Art. 911b, Vernon's Annotated Civil Statutes, 1925) except the requirement that he have a so-called "State Interstate Certificate of Convenience and Necessity" (R. 36-37).

The Texas Legislature passed in 1931 what we commonly refer to as the "Motor Carrier Truck Law" (Acts 1931, 42nd Leg., p. 480, Ch. 277; Art. 911b, Vernon's Annotated Civil Statutes of Texas, 1925) making no distinction in its application to intra and interstate commerce. The only applicable provision of the Texas Act requiring a "certificate of convenience and necessity," in part, follows:

> "Section 3. No motor carrier shall, after this Act goes into effect, operate as a common carrier without first having obtained from the Commission, under the provisions of this Act, a certificate of convenience and necessity *pursuant to a finding to the effect that the public convenience and necessity require such operation.*" etc.

This is the certificate which respondents say petitioner must have and which petitioner does not even claim to have.

Petitioner says he never did have to have any such certificate but that if he did that then the Federal Motor Carrier Act, 1935, superseded that part of the Texas Act requiring certificates or permits to operate exclusively in interstate commerce.

This case does not involve an appeal from, nor an attack on, an order of the Railroad Commission.

Petitioner, operating a common carrier truck line had, January 16, 1936, a truck loaded with interstate freight opped by respondents at or near Conroe, Texas, and his iver arrested and thrown in jail because he did not hold state interstate certificate of convenience and necessity. 140-142). Respondents issued orders to all Commission spectors to arrest all of petitioner's drivers and to stop titioner's operations (R. 8-9-140). Respondent Hood dered petitioner to cease operation (R. 140).

Petitioner, alleging the foregoing facts, applied to the ederal District Court for the Northern District of Texas, ting at Fort Worth, for injunctive relief upon further egation that petitioner had complied and was complying th all applicable laws of the State of Texas (R. 9-37); that y requirement of the Texas Act as to certificates or per- ts to operate in interstate commerce had been superseded the Motor Carrier Act, 1935, and that the acts of respond- ts complained of were unlawful and constituted an inva- on of your petitioners rights under the laws and Consti- tion of the United States in the following particulars (R. -16):

(a) Destroyed petitioner's valuable rights of property der the Commerce Clause of the Constitution.

(b) Deprived your petitioner of his property and rights valuable property guaranteed under the Due Process ause of the 14th Amendment.

Respondents demurred to the Bill of Complaint asserting effect that they still retained the power to require of an clusively interstate motor carrier that he obtain a "cer- cate of convenience and necessity," in spite of the Motor rrier Act, 1935 (R. 21).

Respondents then answered and admitted and "allege the fact to be, that complainant (your petitioner here) for several years prior and subsequent to June 1, 1933, has been transporting commodities between various points within the State of Texas" (R. 23), over the highways as alleged in the bill of complaint. Respondents offered no evidence whatsoever except that your petitioner had no certificate of convenience and necessity and had operated under a permanent injunction granted by a District Court of Travis County, Texas, which had been dissolved by the Third Court of Civil Appeals of Texas (R. 152-153) and the testimony of a witness about the physical condition of the highways of Texas (R. 153) in support of their contention that the Railroad Commission could still require an interstate common carrier to obtain a certificate or permit (R. 29; Respondents' Answer, paragraph IX).

There is no dispute as to the facts. The whole controversy in this case is:

(1) Can the State of Texas burden and regulate interstate commerce under its Motor Carrier Truck Law by requiring interstate certificates or permits of exclusively interstate common carriers, since, and while the Interstate Commerce Commission is authorized to regulate it under the Federal Motor Carrier Act, 1935?

(2) Is the regulation of interstate commerce by carriers using the highways a joint regulation by the states and the Federal Government so far as certificates of authority are concerned; and if so when did the states acquire authority to regulate interstate commerce?

(3) Would not the authority contended for by respondents be a direct regulation of interstate commerce?

(4) In respect of the granting of certificate of convenience and necessity, did the Motor Carrier Act, 1935, supersede the Texas Motor Truck Law; or is there a divided

authority whereby a carrier has to obtain certificate both from the Interstate Commerce Commission and from the State Commissions before he can operate?

Your petitioner asserts that the Motor Carrier Act, 1935, superseded the State Act in respect of these matters. That there can be no divided authority in such matters either constitutionally or practically. That the authority claimed by respondents is a direct regulation of and burden upon interstate commerce.

The Honorable Fifth Circuit Court of Appeals says in effect, if not in so many words, that a motor carrier must get a certificate of convenience and necessity from the Interstate Commerce Commission and then go to the State Commissions and say to such Commission, I have here now my Federal certificate, pray Sirs, may I use your highways, and if the State Commission says "No", there interstate commerce must stop; that there is a joint and dual regulation imposed, each of which would, we suppose, supplement the other.

Section 206a Motor Carrier Act, 1935, in its so-called grandfather provision directly granted to petitioner under the undisputed facts of this case, a certificate of convenience and necessity authorizing operation during the pendency of his application. Can the Railroad Commission of Texas deprive him of that direct grant? Can the State, much less the Railroad Commission, grant or refuse certificates of convenience and necessity to operate exclusively in interstate commerce while Congress is exercising that power under the Constitution? The trial court did not think so and permanently enjoined the respondents (R. 33).

Yet the Circuit Court of Appeals, Fifth Circuit, in its opinion, dated April 12, 1938, says:

> "Moreover, said Act does not provide that every person who shall receive a certificate of public convenience

and necessity *shall be entitled to the use of the various highways of the state,* but the said Act prohibits anyone engaging in interstate commerce until he receives such certificate from the Interstate Commerce Commission. The Interstate Commerce Commission under the Act has the power and exclusive authority to pass upon such applications and to refuse them. If it should refuse one, then such applicant would not be permitted to engage in interstate commerce. This is made clear by the Act. That provision, however, is not in direct conflict with the provisions of the Motor Truck Laws of the State of Texas which require the Railroad Commission of the State of Texas to determine whether or not the preservation of its highways and the safety of the traveling public will be endangered if there is an excessive amount of traffic on the highways. *The determination of that question has been left to the states.*" (Emphasis ours.)

Can this be so? That is the controversy here in 1938.

Reasons Relied on for Allowance of the Writ.

Your petitioner is entitled to his certificate of convenience and necessity from the Interstate Commerce Commission under Sec. 206a, Motor Carrier Act, 1935, as a matter of law and as of right under the undisputed facts found by the trial court (R. 35-36; court's findings Nos. 5, 8, 9, 10, 11, and 12); as well as under the Interstate Commerce Commission decision in the *Slagle* case, 2 M. C. C. 127; and the decision of the Circuit Court of Appeals deprives petitioner of valuable properties and rights of property and construes the Motor Carrier Act, 1935, inconsistently with and contrary to the Commerce Clause of the Constitution.

The action of the Circuit Court of Appeals is contrary to and violative of the rights guaranteed to petitioner under the 14th Amendment to the Constitution of the United States and permits the respondents to take or destroy valuable property rights without compensation.

There can be no dual authority to regulate interstate commerce carried on by motor carriers such that a carrier must first obtain a certificate of convenience and necessity from the Interstate Commerce Commission and then plead with the States for permission to use the highways of the States as the Circuit Court of Appeals has held. Such a holding would destroy Federal regulation and permit the States to directly regulate interstate commerce. Congress has occupied that field, preempted to it by the Constitution of the United States, and whatever may be the incidental effect of State regulation upon interstate commerce, the power and authority to grant certificates of convenience and necessity authorizing the use of the highways is now vested exclusively in the Interstate Commerce Commission.

The interpretation which the Circuit Court of Appeals has placed on the Motor Carrier Act, 1935, defeats the Commerce Clause of the Constitution. The interpretation which said court puts on the Texas Motor Truck Law makes that Act operate as a direct regulation of interstate commerce in violation of the Commerce Clause of the Constitution, and therefore unconstitutional, all in violation of the rights guaranteed to your petitioner under the Constitution.

The Circuit Court has construed the Texas Motor Truck Law contrary to the construction placed upon it by the Supreme Court of Texas in *Southwestern Greyhound Lines, Inc.*, v. *Railroad Commission of Texas et al.*, 99 S. W. (2d) 268, and contrary to the Third Court of Civil Appeals of Texas in *Railroad Commission et. al.* v. *Bates*, 108 S. W. (2d) 283, in cases involving the same question of law as is here involved.

The Circuit Court has in this case decided the same question of law contrary to the Supreme Court of Florida in *State ex rel. L. & L. Freight Lines* v. *Douglass*, 169 So. 389, and in *State ex rel. R. C. Motor Lines* v. *Florida Railroad*

Commission, 123 Fla. 345, 166 So. 840, the courts of each State saying that the State commissions, after grant to a carrier of a Federal certificate, must give such carrier a certificate "as a matter of right," this being no more than a State registration for the purpose of enabling a State "to enforce against the interstate operation all of the police regulations" and such regulations extend only to weight, speed, load, lights, brakes, and similar regulation.

The two next preceding paragraphs demonstrate, first, that the Circuit Court has decided an important question of local law contrary to the decisions of our State courts and has applied Texas law to a situation that brings that law within the inhibitions of the Constitution of the United States; and, second, that the Circuit Court has decided a vastly important question of Federal law which has not but ought to be decided by this Court, and more especially since the decision of the Circuit Court in this case nullifies effective regulation by the Federal Government of interstate commerce by motor carrier and abrogates the Commerce Clause of the Federal Constitution; and, third, that the opinion and judgment in this case is contrary to the weight of authority.

The opinion and judgment of the Fifth Circuit Court in this case is destructive of the civil rights and rights of property of your petitioner as guaranteed under the Constitution in a decision of general law which is untenable and in conflict with the great weight of authority, and in conflict with the decisions of this Court in *Gibbons* v. *Ogden*, 22 Sup. Ct. 1, 9 Wheat. 23; *Passenger Cases*, 7 Howard 283; *Freight Rate Taxing Cases*, 15 Wall. 232; *Gillman* v. *Philadelphia*, 3 Wall. 713; *Bowman* v. *C. & N. W. Ry. Co.*, 124 U. S. 465, 8 Sup. Ct. 689; *Bush* v. *Malloy*, 45 Sup. Ct. 327; *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370; *Chicago, Rock Island & Pacific Ry. Co.* v. *Hardwick Farmers Elevator Co.*, 226 U. S. 426, 33 Sup. Ct. 176; *Erie Railroad*

Co. v. *New York,* 233 U. S. 671, 34 Sup. Ct. 759; *M. K. & T.* v. *Harris,* 234 U. S. 417, 34 Sup. Ct. 792; *Prigg* v. *Pennsylvania,* 41 U. S. 535, 16 Peters 539; *Smith* v. *Alabama,* 124 U. S. 466, 8 Sup. Ct. 564; *Southern Railway Co.* v. *Railroad Commission of Indiana,* 236 U. S. 439, 35 Sup. Ct. 304; *Washington-Oregon Co.* v. *State of Washington,* 270 U. S. 87, 46 Sup. Ct. 279; *Missouri Pacific* v. *Porter,* 273 U. S. 341, 47 Sup. Ct. 383; *International Shoe Co.* v. *Pinkus,* 278 U. S. 261.

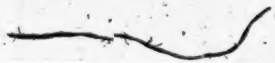
Prayer.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Fifth Circuit Court of Appeals, had in the case numbered and entitled on its docket, No. 8286, Ernest O. Thompson *et al.*, appellants, *vs.* A. E. McDonald, appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Fifth Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated this 14th day of May, 1938.

A. E. MCDONALD,
By T. S. CHRISTOPHER,
Counsel for Petitioner.

PRICE & CHRISTOPHER,
LLOYD E. PRICE,
Of Counsel.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 1052

A. E. McDONALD, *Petitioner,*

vs.

ERNEST O. THOMPSON ET AL.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinions of the Courts Below.

Judgment was rendered in the trial court, Federal Dis-rict Court, Northern District of Texas, Fort Worth, with-ut written opinion; however, the trial court's findings of act and conclusions of law (R. 34 to 38) and its judgment R. 42) are in the transcript.

The opinion of the Circuit Court of Appeals is not yet eported but was entered April 12, 1938, and may be found the record beginning at page 159

Jurisdiction.

(1) Jurisdiction of this cause is conferred upon this onorable Court by *Judicial Code,* Section 240(a), as nended; United States Code Annotated, Title 28, Section 47(a).

(2) The date of the judgment of the Circuit Court of Appeals, Fifth Circuit, is April 12, 1938 (R. 170).

(3) This suit involves a construction of the Federal Motor Carrier Act, 1935, which has never been passed on by this Court, which is of such peculiar gravity and general importance both to the Federal Government and its administrative agency, the Interstate Commerce Commission, and to the States (as well as your petitioner) that it ought to be passed on by this Court in this:

(a) The Circuit Court of Appeals has held in this case that although the authority to grant interstate certificates of convenience and necessity is lodged exclusively in the Interstate Commerce Commission, and that although a carrier obtains such a certificate from said Commission, nevertheless said certificate carries with it no right to use the highways of a State and that such a carrier must then beg of the State Commissions the right to use the highways.

(b) Such holding of the Circuit Court of Appeals nullifies the Commerce Clause of the Federal Constitution and defeats interstate motor carrier common carrier regulation by the Federal Government.

(c) Such holding of said court permits the States to directly regulate interstate commerce and to deny it altogether in plain violation of the Commerce Clause.

(d) Such holding of said court nullifies the Motor Carrier Act, 1935, and defeats the express congressional purpose and will be found in Section 202 (U. S. C. A., Title 49, Sec. 302) of said Act wherein it is declared to be the policy of Congress to so regulate transportation by motor carriers as to "preserve the inherent advantages of, and foster sound economic conditions * * * in the public interest" and "to develop

and preserve *a highway transportation system properly adapted to the needs of the United States and of the National defense*" (emphasis ours), all of which would be utterly impossible if the Interstate Commerce Commission can *only* say when a carrier may have a certificate and the States have the *final* say and tell such carrier if he can in fact actually operate.

(e) Such holding of said Court places the direct regulation of interstate commerce by motor carrier under the joint control of the Federal and State Governments (and their commissions) whereas the states have never had any power to directly regulate interstate commerce but may, of course, pass such regulation as may incidentally affect interstate commerce.

(4) The opinion and judgment of the Circuit Court of Appeals in its application to State laws, and especially to the Texas Motor Truck Law, makes those laws unconstitutional as a direct regulation of interstate commerce, in violation of the Commerce Clause; an application which this Court and the Supreme Court of Texas has studiously avoided. This Court bottomed its opinion which sustained the Texas Truck Law (Acts 1931, 42nd Leg., page 480, Ch. 277; Art. 911b Vernon's Annotated Civil Statutes of Texas, 1925) in *Stephenson* v. *Binford*, 287 U. S. 251, 53 Sup. Ct. 181, upon the proposition that the Texas statute "rests definitely upon the policy of highway conservation" a mere incidental regulation of interstate commerce which as made clear in *Sproles* v. *Binford*, 286 U. S. 374, 52 Sup. Ct. 581, the State may prescribe "in the absence of national legislation especially covering the subject * * *". The Supreme Court of Texas in *Southwestern Greyhound Lines* v. *Railroad Commission of Texas*, et al. 99 S. W. (2d) 268 held that whatever right the Railroad Commission of Texas had to require any kind of a certificate had been superseded by the Motor Carrier Act, 1935, and the Court of Civil

Appeals of Texas in *Railroad Commission* v. *Bates*, 108 S. W. (2d) 296 holding that whenever the Interstate Commerce Commission issued a carrier a certificate that the Texas Commission must issue its certificate more as a matter of registration "as a matter of right." Any other holding would effect a direct regulation of interstate commerce and such a State statute would be robbed of the only theory upon which it could be sustained.

(5) Congress having occupied the field of interstate regulation of motor transportation as relates to the grant of "certificates of convenience and necessity" and provided for their issuance in Section 206 of the Motor Carrier Act, 1935 (U. S. C. A., Title 49, Sec. 306) and providing that no carrier "subject to the provisions of this part" shall operate without such certificate, "unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission *authorizing such operations*" and providing in section 208 of said Act that such certificate shall specify certain things including "the routes over which, the fixed termini, if any, between which" and "the territory within which, the motor carrier *is authorized to operate*" all State authority, if any it ever had, is superseded and the adverse determination of that question by the Circuit Court of Appeals presents a question of such gravity and difference of opinion between said Court and the Supreme Court of Texas and of such importance to the jurisdiction of the Nation as not only gives but requires this Court to take jurisdiction to correct the obviously erroneous judgment herein complained of.

(6) Under the undisputed facts found by the trial court, petitioner is entitled to certain valuable rights, properties, and rights of property in that the trial court found that petitioner was in "bona fide operation" on June 1, 1935 (R. 35) as that term is used in Section 206 of said Act, to

which rights petitioner lays claim under said Act and in respect of which he seeks the protection of this Court under the rights guaranteed to him under the Commerce Clause, the 5th and 14th Amendments to the Constitution of the United States.

(7) The following cases, among others, sustain the jurisdiction of this Court to review the instant case:

Gibbons v. *Ogden*, 22 Sup. Ct. 1, 9 Wheat. 23;
Gilman v. *Philadelphia*, 3 Wall. 713;
Bowman v. *C. & N. W. Ry. Co.* 125 U. S. 465, 8 Sup. Ct. 689;
Bush v. *Maloy*, 45 Sup. Ct. 327;
Northern Pacific Ry. Co. v. *Washington*, 222 U. S. 370;
Chicago, Rock Island & Pacific Ry. Co. v. *Hardwick Farmers Elevator Co.*, 226 U. S. 426, 33 Sup. Ct. 176;
Erie R. Co. v. *New York*, 233 U. S. 671, 34 Sup. Ct. 759;
M. K. & T. v. *Harris*, 234 U. S. 417, 34 Sup. Ct. 792;
Prigg v. *Pa.*, 41 U. S. 535, 16 Pet. 539;
Smith v. *Alabama*, 124 U. S. 466, 8 Sup. Ct. 564;
Southern Ry Co. v. *Railroad Commission of Indiana*, 236 U. S. 439, 35 Sup. Ct. 304;
Washington Oregon Co. v. *State of Washington*, 270 U. S. 87, 46 Sup. Ct. 279;
Missour Pacific v. *Porter*, 273 U. S. 341, 47 Sup. Ct. 383;
International Shoe Co. v. *Pinkus*, 278 U. S. 261;
Southwestern Greyhound Lines, Inc. v. *Railroad Commission of Texas, et al.*, 99 S. W. (2d) 268;
Railroad Commission of Texas v. *Bates, et al.*, 108 S. W. (2d) 256;
State ex rel. L. & L. Freight Lines v. *Douglas*, 169 So. 389;
State ex rel. R. C. Motor Lines v. *Florida Railroad Commission*, 123 Fla. 345, 166 So. 840;
Stephenson v. *Binford*, 287 U. S. 251, 53 Sup. Ct. 181.

Statement of the Case.

A full statement of the case has been given under the *summary statement* in the petition and in the interest of brevity the statement is not repeated here.

Specification of Errors.

(1) The Circuit Court erred in holding that the Motor Carrier Act, 1935, does not authorize a carrier receiving a certificate of convenience and necessity, under authority thereof, to use the "various highways of the State" (R. 169) in that there is both express and necessarily implied authority found in the statute.

(2) The Circuit Court erred in holding that the Motor Carrier Act, 1935, "does not provide that every person who shall receive a certificate of public convenience and necessity shall be entitled to the use of the various highways of the State" (R. 169) in that such holding defeats the expressed will of Congress announced in Sec. 202 of said Act and denies the express authority found in Sections 204, 206, 207, and 208 of the Act.

(3) The Circuit Court erred in the holding pointed out in the next preceding specification of error in that such holding denies the existence of the Commerce Clause of the Federal Constitution or attempts to nullify it.

(4) The Circuit Court erred after holding that "The Interstate Commerce Commission under the Act has the power and exclusive authority to pass upon such applications" (R. 169) that nevertheless the State of Texas could require a certificate of authority as a condition precedent to the use of the highways in interstate commerce the provision of the Federal Act not being "in direct conflict with the provisions of the Motor Truck Laws of the State of Texas" (R. 169) it being inconceivable how greater con-

ict could arise when the power asserted in this cause by espondents, and which the Circuit Court says they have, the absolute power of veto and the power to prohibit nterstate commerce.

(5) The Circuit Court erred in its holding as demonrated in those portions of the opinion referred to in the receding specifications that the power to regulate and ontrol interstate motor transportation resides jointly in he State and Federal governments in that there can be o such thing as joint control for the obvious reasons that:

(a) Either government under the holding of the Circuit Court would have the power of absolute veto over interstate commerce, bringing about inevitable conflict and confusion; the very thing that the Commerce Clause of the Federal Constitution, based upon experience, was designed to prevent.

(b) Under the opinion of the Circuit Court and the authority which it says the Railroad Commission of Texas has, the state would directly (not incidentally) regulate interstate commerce in plain violation of the Commerce Clause of the United States Constitution.

(6) The Circuit Court of Appeals erred in so construing he Texas Motor Truck Law as to give the Railroad Comission of Texas under said Act authority to directly regute interstate commerce, contrary to the Constitution of he United States and contrary to the construction given he Texas Act by the Supreme Court of Texas in the *Southestern Greyhound Lines* case, 99 S. W. (2d) 268, and by he Court of Civil Appeals of Texas in the *Bates* case, 98 S. W. (2d) 283.

(7) The Circuit Court of Appeals erred in holding that e Motor Carrier Act, 1935, did not supersede the Texas

Motor Truck Law in respect to the matter of granting of certificates of convenience and necessity to operate in interstate commerce.

(8) The Circuit Court of Appeals erred in its holding that the Motor Carrier Act, 1935, did not supersede the Texas Motor Truck Law, the court saying "The authority and control over the highways which the Railroad Commission is attempting to exercise is not the same authority and power to regulate interstate commerce as is vested in the Interstate Commerce Commission" in that:

(a) The power to regulate the use of the highways in the manner as construed by the Circuit Court departs from highway regulation and becomes a regulation of commerce itself. The power to veto the flow of interstate commerce is not a highway regulation but a regulation of commerce.

(b) Congress having occupied the field of authority to grant certificates of convenience and necessity, this entire field is preempted to the complete exclusion of State regulation or authority; it being a conclusive presumption that Congress has gone as far in that field as it thought necessary and that no further or additional Congressional action was required and no further State regulation may be enacted nor invoked in aid of nor supplementary to the Federal legislation as to right itself to carry on interstate commerce.

(9) The Circuit Court erred in its holding that the Motor Carrier Act, 1935, "does not provide for any tribunal to determine the method by which the public highways of any State shall be maintained or preserved, nor how the safety of the traveling public may be protected against any dangers that might be caused by an undue amount of traffic" (R. 169) in that:

(a) It must be assumed (if any such question enters into consideration) that the Interstate Commerce Com-

ission will so protect the Nation's highways and the power to do so is necessarily implied from the authority granted.

(b) If we are in error as to the assumption set out in the next preceding paragraph then the silence of Congress on that subject amounts to a legislative declaration that no such legislation is needed at present and State laws may not be invoked in aid of, as either supplementing or complementing, the Federal legislation.

(c) Assuming arguendo, that we are in error in both sub-paragraphs (a) and (b) above, then it is asserted that the Circuit Court was in error in that the Motor Carrier Act, 1935, is an open legislative declaration that no Congressional legislation on this subject was necessary, the Act having declared that:

"Provided, however, that no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require." (Sec. 208, Motor Carrier Act, 1935.)

This excludes state legislation in respect to the matters complained of in the Court's holding quoted above and negatives the entire thesis of the Circuit Court.

(d) Section 204-(a) (1)-(2), and (3), Motor Carrier Act, 1935 specifically enters the field which the Circuit Court said was still reserved to the state and by express provisions authorizes the Interstate Commerce Commission "To regulate common carriers by motor vehicle" and to "establish reasonable requirements with respect to * * * qualifications and maximum hours of service of employees *and safety of operation*

and equipment." Section 204(a)(2) refers to the contract carriers in same language and Section 204(a)(3) private carriers providing for "reasonable requirements to promote safety of operation" etc., all of which is such a definite entry of the field by Congress to provide a "tribunal" to determine a method by which the highways "shall be maintained or preserved" and to protect "the safety of the traveling public" as to completely exclude state action or interference. The Interstate Commerce Commission is exercising that authority (see Ex Parte No. M. C.-2 and Ex Parte No. M. C.-4). The Circuit Court's contrary holding is error.

(10) The Circuit Court erred in reversing the trial court's judgment and ordering the bill dismissed in that the Interstate Commerce Commission is not a party to the suit and the only effect of the permanent injunction was, first, to preserve petitioner's valuable rights guaranteed under the Constitution and Section 206(a) of the Motor Carrier Act, 1935, which provides: "That, subject to section 210, if any such carrier or predecessor in interest was in *bona fide* operation as a common carrier by motor vehicle on June 1, 1935 over the route or routes or within the territory for which application is made, *and has so operated since that time* * * * the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, *and without further proceedings*, if application" is made as required in paragraph (b) of said section and within one hundred twenty days, such language of the statute not only clearly authorizing but *requiring* a continuance of the operation to preserve valuable rights; and, second, to prevent irreparable injury in the destruction of petitioner's business and good will.

(11) The Circuit Court erred in reversing the trial court and ordering the bill dimissed in that although the injunction was permanent it was in fact temporary in nature because if the Interstate Commerce Commission refused petitioner's application he could not operate anyway and it was error to deny to petitioner the clear right conferred upon him by the Constitution and Section 206(a), in fact required of him, petitioner being in *bona fide* operation on June 1, 1935 (R. 38, Court's Conclusion of Law No. 4); which raises the very interesting question, if the Circuit Court could conceivably be right, that if a carrier has to get both State and Federal certificates, where should he first go?

(12) Sifted down the Circuit Court holds that your petitioner is not entitled to operate and that respondents can stop him in spite of the fact that the trial court held that petitioner was in *bona fide* operation on June 1, 1935 and continuously since, and in spite of the fact that Joint Board No. 16 of the Interstate Commerce Commission has held that petitioner was in *bona fide* operation on June 1, 1935 and continuously since and recommended the grant of an interstate certificate (Report and Recommended Order Joint Board No. 16 in M. C. 80,415) thus setting up the State as establishing the rule of conduct in the flow of interstate commerce. The holding of the Circuit Court and the facts of this case is the best argument in demonstration of the conflict of law and the error of the Circuit Court of Appeals judgment.

ARGUMENT.

Summary of the Argument.

Point A.

The Motor Carrier Act, 1935, Title 49, U. S. C. A. Section 301, *et seq.*, in respect to any authority of the Railroad Commission of Texas to grant to or require from an inter-

state carrier by motor vehicle a certificate or permit authorizing the use of the highways, superseded such State authority, if any it ever had.

Point B.

There can be no such thing as joint or divided authority to regulate interstate commerce wherein the States could veto the authority of the Federal Government; the principle being established that the exercise by the State of its police power, which would be valid in the absence of Federal regulations, is superseded by Federal authority when there is such repugnance or conflict that is so direct and positive that the two acts cannot stand together.

Point C.

Exclusive jurisdiction of Interstate Commerce Commission with reference to certificate having attached through petitioner's filed application, the same negatives asserted State jurisdiction and forbade State interference.

Point D.

The provision of Section 206, Motor Carrier Act, 1935, that "pending the determination of any such application the continuance of such operation shall be lawful" directly authorizes petitioner to continue his operations and necessarily forbids interference by State authorities, and injunction of District Court enjoining such interference was right.

POINTS A & B.

The Motor Carrier Act, 1935, superseded all Texas laws purporting to require a certificate or permit to operate in interstate commerce.

This case is not an appeal from any order of the Railroad Commission of Texas as seemingly conceived by the Circuit Court of Appeals (R. 169-170).

Your petitioner was a party to an appeal from an order of the Railroad Commission of Texas in a case which arose prior to the passage of the Motor Carrier Act, 1935 and which involved another and entirely different set of facts and circumstances, and the Court of Civil Appeals of Texas in *Railroad Commission of Texas* v. *McDonald*, 90 S. W. (2d) 981, which passed on the appeal after the passage of the Motor Carrier Act, 1935, said:

> "All of the matters here presented were passed upon and determined prior to the passage and effective date of what is known as the Federal Motor Carrier Act, 1935 (Title 49, U. S. C. A. section 301, *et seq.*), effective August 9, 1935, and we have not taken that act into consideration in determining the issues here presented."

Your petitioner here being in *bona fide* operation over the highways on June 1, 1935 (R. 38), filed his application within the time required by the Motor Carrier Act, 1935 (R. 36), and was entitled to continue to operate exclusively in interstate commerce, as he was doing (R. 36), until the Interstate Commerce Commission passed upon his application, either granting or denying the same. When confronted with an effort on the part of the Railroad Commission of Texas, the respondents herein, application was made to the Federal District Court for the Northern District of Texas and upon trial of the cause upon its merits a permanent injunction was issued by that court (R. 33).

The questions presented here therefore are, first, whether the Railroad Commission of Texas can regulate interstate commerce by requiring of an interstate common carrier truck operator a permit or a certificate to use its highways while the Interstate Commerce Commission, under authority of Congress, as set out in the Motor Carrier Act, 1935, is regulating that commerce in the requirements for certificates of convenience and necessity, and,

second, whether your petitioner is entitled to continue his operation as a motor carrier under the Act of 1935, as he is entitled to do, until the Interstate Commerce Commission either grants or refuses the application.

The Circuit Court of Appeals in its opinion says with reference to the supposed requirement of the Texas Act requiring an exclusively interstate motor truck carrier to have a permit to use the highways of the State of Texas "is not in direct conflict" with the provisions of the Motor Carrier Act, 1935 requiring of all interstate motor truck operators operating as common carriers a certificate of convenience and necessity.

The effect of the opinion therefore is this: That before a common carrier truck operator can operate in interstate commerce, although such operator has complied with the Acts of Congress by obtaining from the Interstate Commerce Commission a certificate of convenience and necessity as required by Section 206, Motor Carrier Act, 1935, he must still go to the various State commissions and obtain a permit from the State commissions to use the highways. Such an interpretation of State laws amounts to a direct regulation of interstate commerce because it puts it within the power of the State either to permit interstate commerce to flow freely over the highways of the State or to forbid it altogether. The States have never had any such power.

The Commerce Clause of the Constitution of the United States makes it clear that the regulation of interstate commerce is a matter which is national in scope and admits of only one uniform regulation and that regulation may of course be imposed only by Congress. Various State laws, including the Texas Motor Truck law, have been sustained on the theory of their being only highway regulation and as only incidentally affecting interstate commerce. Now the Circuit Court of Appeals construes the Texas law in

a way which makes it a direct regulation of interstate commerce, putting it within the power of the State of Texas to either permit the flow of interstate commerce or to veto it in spite of any authorization of the Interstate Commerce Commission for operation over the highways of the State of Texas.

Such could hardly be the law, and how could there be a more direct regulation of interstate commerce, and how there could be greater conflict is inconceivable. We assume that it would be almost improper to begin this argument without first referring to *Gibbons* v. *Ogden,* 22 Sup. Ct. 1, 9 Wheat. 23, the leading case upon this subject and which, as we conceive it, definitely and finally settles the question presented in this case.

Can the State require a permit of any kind to operate in interstate commerce since the Federal Government has occupied that field and has required of interstate truck operators certificates of convenience and necessity before engaging in common carrier transportation over the highways?

Now that we have referred to *Gibbons* v. *Ogden, supra,* to which we shall find occasion later to refer, we want especially to refer to the *Passenger Cases,* 7 Howard 283, in which this Court said:

> "A concurrent power excludes the idea of a dependent power. The general government and a state exercise concurrent powers in taxing the people of the state. The objects of taxation may be the same, but the motives and policy of the tax are different, and the powers are distinct and independent. *A concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impracticable in action. It involves a moral and physical impossibility. A joint action is not supposed, and two independent wills cannot do the same thing.* The action of one, unless there be an arrangement, must

> necessarily precede the action of the other; and that which is first, being competent, must establish the rule. If the powers be equal, as must be the case, both being sovereign, one may undo what the other does, and this must be the result of their action. (Emphasis ours.)

It seems that we are not required to go further to establish the fact that the State of Texas cannot require certificates while the Federal Government is requiring certificates of convenience and necessity of those engaged as common carrier truck operators. It is obvious that under the opinion of the Circuit Court of Appeals in this case, if that be the law, that the State of Texas could at any moment undo anything that the Interstate Commerce Commission did and that any one of the other forty-seven states and the District of Columbia could do the same thing. This is a direct clash of governments and of laws wherein State action is superseded.

But going on with the holding of this Court in the *Passenger Cases, supra*, this Court said:

> "It has been well remarked that the regulation of commerce consists as much in negative as in positive action. There is not a federal power which has been exerted in all its diversified means of operation. And yet *it may have been exercised by Congress, influenced by a judicious policy* and the instruction of the people. Is a commercial regulation open to State action because the Federal power has not been exhausted? *No ingenuity can provide for every contingency; and if it could, it might not be wise to do so.* Shall free goods be taxed by a state because Congress have not taxed them? Or shall a state increase the duty, on the ground that it is too law? Shall passengers, admitted by act of Congress without a tax, be taxed by a state? The supposition of such a power in a state is utterly inconsistent with a commercial power, either paramount or exclusive, in Congress." (Emphasis ours.)

Congress has occupied the field of interstate regulation as to the requirements for certificates of convenience and necessity, and it must be assumed that Congress has exerted that power to the extent that it felt that it ought to be exerted, and such exertion of power excludes any idea of a similar exertion of a like power by the States. May it not be said that Congress has exerted this power "influenced by a judicious policy" and that a similar exertion by the States is no longer open to them.

In *McCulloch* v. *State of Maryland*, 4 Wheat. 431, this Court said:

> "That there is a plain repugnance in conferring on one government a power to control the constitutional measures of another which other, with respect to those very measures, is declared to be supreme over that which exerts the control is a proposition not to be denied."

Yet in the face of these decisions of this Honorable Court and what we have thought had come to be elementary principles of law fixed in this country, the Circuit Court of Appeals says that the State of Texas can regulate interstate commerce by requiring of an interstate truck operator a permit to use that State's roads, while Congress has provided for the Interstate Commerce Commission to issue certificates of convenience and necessity, authorizing the use of the public roads. The two requirements operate upon exactly the same subject matter and at the same time. It places it within the power of the State to undo everything the Interstate Commerce Commission does. It puts within the power of the States the arbitrary power to veto interstate commerce.

Let it be remembered that the Commerce Clause of the Federal Constitution was made a part of that Constitution because of the experience of the States under the Confederation within which each State regulated commerce be-

tween itself and every other State, and which regulation was about to bring on internal strife and bloodshed. It was recognized by the framers of the Constitution that the regulation of interstate commerce or commerce between the States, foreign countries, and the Indian tribes was of such a nature as to admit only of one control and of one national, uniform regulation. Let it be remembered further in considering this case, that at the time of the adoption of the Commerce Clause into the Federal Constitution that railroads were unknown. Interstate commerce was carried on then only by means of roads and navigable waters.

The Commerce Clause adapts itself to new or changing means and modes of transportation, but in keeping the public roads and highways of the nation open to a free flow of interstate commerce, the Commerce Clause is not adapting itself to a new means of transportation because those roads themselves are as much a part of the instrumentality of commerce as the use of the newly developed truck in the handling of interstate commerce. The Commerce Clause made it clear in the beginning that this original means of interstate commerce, the highways of the country, should be kept open to a free flow of interstate commerce—the truck simply displaces the ox-cart and the horse-drawn wagon.

The Circuit Court of Appeals has said in this case "that said act does not provide that every person who shall receive a certificate of public convenience and necessity shall be entitled to the use of the various highways of the State." (R. 172.) In other words, under the opinion of the Circuit Court before one is authorized to operate under the Motor Carrier Act of 1935, he must get two certificates of convenience and necessity—one by complying with the acts of Congress and obtaining such a certificate from the Interstate Commerce Commission, and then by complying with the requirements

of State regulation, which the courts have chosen to designate a permit—contrary to the designation of the Texas law wherein they are called certificates of convenience and necessity. This is dual regulation—two sovereignties operating upon the same subject matter at the same time—one undoing the acts of the other. This cannot be.

But going back to the Circuit Court's statement that the act does not provide that a person who receives a certificate from the Interstate Commerce Commission is authorized to operate. It is clear from an examination of the Motor Carrier Act, 1935, as well as from the records of the co-ordinator of transportation in his report to Congress in 1934 and from the consideration of the Act in Congress (Congressional Record for Monday, April 15, 1935, pages 5877 to 5896, inc., and for Wednesday, July 31, 1935, pages 12679 to 12716, inc.) that there never was any thought whatsoever except that when the Interstate Commerce Commission had issued its certificate of public convenience and necessity under the provisions of the Motor Carrier Act, 1935, that such certificate would authorize the holder thereof to operate over the highways of the States irrespective of any action by the States. A very large number of States, in fact practically all of them, had, prior to the consideration of the Motor Carrier Act, 1935, by Congress, enacted some form of regulatory measure, such regulations applying to intrastate commerce and some of them, as the Texas Act, applying to a regulation of the use of the highways in interstate commerce. This Court has uniformly refused to sustain State laws of this character involving commercial consideration for the use of the highways, or which attempted to require certificates of convenience and necessity of interstate operators. *Buck* v. *Kuykendall*, 267 U. S. 307, 45 Supreme Court 324; *Bush* v. *Malloy*, 45 Sup. Ct. 327; *Morris* v. *Duby*, 274 U. S. 143, 71 L. Ed. 966, and other cases. The Court had sustained some of those laws, including the Texas law, on the basis

that they were purely highway regulatory laws. *Sproles* v. *Binford*, 286 U. S. 374, 76 L. Ed. 167; *Stephenson* v. *Binford*, 53 Sup. Ct. 181.

Every State law which provided for certificates of convenience and necessity was a law which authorized the holder of such certificate of convenience and necessity, issued by the proper commission, to use the highways of the particular State. This fact was before Congress and Congressional consideration of the use of the phrase "certificate of convenience and necessity" conveyed no other thought than that when such certificate was issued by the Interstate Commerce Commission to a carrier that it carried with it the authority to use the highways.

This thought recurs throughout the Motor Carrier Act, 1935.

The declaration of policy in Section 202 of the Motor Carrier Act, 1935, declares it to be the policy of Congress to regulate transportation by Motor Carriers "in such manner as to recognize and preserve the inherent advantages of *and foster sound economic conditions in,* such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; *develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States, and of the national defense;*" etc. The effect of the decision of the Circuit Court in this case is that McDonald must have a State permit in order to operate lawfully even though he now is a part of a national interstate system of motor transportation designed by Congress to assist in the national defense. A war measure

under such a construction is thus made dependent on the will and consent of State agencies.

If it be within the power of a State to veto the acts of Congress by stopping interstate commerce at its border as the Circuit Court has said, and if upon the issuance by the Interstate Commerce Commission, in accordance with the requirements of the Motor Carrier Act, 1935, of a certificate of convenience and necessity an operator by motor vehicle cannot operate, how can the policy of Congress as stated in the declaration of policy be carried into effect "and foster sound economic conditions in such transportation * * * in the public interest" and how can the policy of Congress be given effect to "promote * * * efficient service by motor carriers," and how can the policy of Congress be given effect by the Interstate Commerce Commission "to develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense?" The Federal Government could not possibly develop and preserve a highway transportation system adapted to the needs of the commerce of the United States and of the national defense if it be put within the arbitrary power of a State to meet the holder of a certificate of convenience and necessity issued by the Interstate Commerce Commission at a State boundary and say to such an operator, it is true that you have complied with the acts of Congress, but here you must stop. You cannot use our highways. A clearer case of conflict of law cannot be imagined.

Again, it is made clear that a certificate of convenience and necessity issued under the Motor Carrier Act, 1935, authorizes the use of the highways and supersedes all State law on that subject by subdivision (c) of Section 202, Motor Carrier Act, 1935, wherein Congress said:

> "Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize

a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

This Section 202, Motor Carrier Act, 1935, to which we are referring is designated as "Declaration of Policy and Delegation of Jurisdiction." There is a familiar rule of construction that that which is not included is excluded, and Congress has seen fit to say to the States exactly what powers they can exercise, and since it has enumerated those powers as to interstate commerce all other powers are excluded. It is plain and certain from a consideration of the declaration of policy and delegation of jurisdiction that certificates of convenience and necessity issued by the Interstate Commerce Commission pursuant to the Motor Carrier Act, 1935, carries with it the authority to use the highways of the various States, and that all laws in conflict therewith are superseded. The Circuit Court of Appeals at New Orleans erred in holding otherwise. But this is not all that is found in the Motor Carrier Act to show that certificate of convenience and necessity carries with it the authority to use the highways of the State, because Section 206, Motor Carrier Act, 1935, uses the language, "unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission *authorizing* such operations."

Section 207, Motor Carrier Act, 1935, uses the language "subject to Section 210, a certificate shall be issued to any qualified applicant therefor, *authorizing the whole or any part of the operations covered by the application.*" (Emphasis ours.)

Section 208, Motor Carrier Act, 1935, uses the language, "Any certificate issued under Section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate

and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, *the territory within which, the motor carrier is authorized to operate.*" (Emphasis ours.)

Section 209, Motor Carrier Act, 1935, with reference to contract carriers, used the word "authorized." There is no doubt at all upon a consideration of the Motor Carrier Act and its legislative history but that Congress intended and that it did, in providing for the issuance of certificates of convenience and necessity, provide that the holder of such certificate would be authorized to use the various highways of the State, State legislation to the contrary notwithstanding.

This Court and various other Federal courts, as well as the Supreme Court of this State, has been very careful in order to uphold the constitutionality of the Texas motor truck law as applied to interstate commerce, to give it any effect at all as to such commerce, to hold it valid as it may have applied to the incidental regulation of the use of the highways, unquestionably its principal purpose being the regulation of commerce as such. *Sproles* v. *Binford, supra; Stephens* v. *Binford, supra; Southwestern Greyhound Lines, Inc.,* v. *Railroad Commission,* Supreme Court of Texas, 99 S. W. (2d) 263; *Railroad Commission of Texas et al.* v. *Bates,* Texas Comm. of Appeals, 108 S. W. (2d) 296. But now the Circuit Court of Appeals in this case interprets the Texas truck law in a way such as to make it wholly unconstitutional, as being a direct regulation of interstate commerce, and therefore wholly unconstitutional. In the *Greyhound Lines* case, *supra,* the Supreme Court of Texas said that the Texas truck law was superseded by the Federal Motor Carrier Act, using the following language:

> "An analysis of the Act (Federal Motor Carrier Act, 1935) clearly shows that it was the purpose of

Congress in enacting this law to delegate to the Interstate Commerce Commission the *exclusive authority to pass upon the application of a motor carrier engaged exclusively in interstate commerce* on the highways for a certificate of public convenience and necessity. Such construction of the law does not deprive the State from protecting its highways and the public safety by reasonable and uniform regulation and exacting reasonable compensation for the use of such highways. *Michigan Public Utilities Commission, et al.* v. *Duke*, 266 U. S. 570, 45 Sup. Ct. 191, 69 L. Ed. 445, 36 A.L.R. 1105; *Buck* v. *Kuykendall*, 267 U.S. 307, 45 Sup. Ct. 324, 69 L. Ed. 623, 38 A.L.R. 286. It is not necessary to discuss here the extent of the power of a state to make such rules and regulations nor to define them because that question is not before us.

"The Federal Motor Carrier Act was approved by the President on August 9, 1935. Congress having assumed jurisdiction over this class of legislation, such control is exclusive and such act of Congress superseded State legislation". (Emphasis ours.)

The Court of Civil Appeals of Texas in passing upon the *Bates* case, *supra*, said:

"By the language quoted the Supreme Court held that the Act vested in the Interstate Commerce Commission exclusive authority to pass on all applications of motor carriers engaged exclusively in interstate commerce on public highways for certificates of public convenience and necessity. The court also held that in aid of the enforcement of state policy regulations, the state commission might promulgate reasonable rules and regulations for the protection of the highways and their use by the public; and that it might in like manner establish requirements with respect to safety of equipment or standard of equipment, payment of compensation for the use of the highways, qualifications of truck drivers, insurance, and any other matters over which the jurisdiction of the State

Commission is not in conflict with nor displaced by the Federal Act. *To that end no doubt the Commission may require of each interstate carrier an application for some sort of certificate or permit to be issued after a certificate of convenience and necessity has been issued by the Interstate Commerce Commission, and to be issued as a matter of right upon proper application after the Interstate Commerce Commission has passed upon and issued its certificate of convenience and necessity.*" (Emphasis ours.)

The same court in concluding said:

"Manifestly, if the State Commission cannot be compelled to issue a certificate of convenience and necessity to enable it to enforce its state police regulations to an interstate carrier already temporarily operating under his pending application to the Interstate Commerce Commission for a permanent certificate, then the Commission should not and cannot require of such operator a certificate or permit until the federal right has been made permanent." (Emphasis ours.)

Thus we have the Circuit Court of Appeals in this case construing and interpreting our Texas statute in an unconstitutional way, a construction which should be avoided where possible, and contrary to the interpretation which has been placed upon that statute by our highest State court. We think we need no citation of authority for the proposition that the meaning and scope of application of State laws by the highest State court is binding upon Federal courts.

In our further consideration of this case, we may entirely dismiss from consideration the recent case of this Court in *South Carolina State Highway Commission et al. v. Barnwell Bros.*, — Sup. Ct. —, because that case is not in point, although the Circuit Court of Appeals relies almost entirely upon such case to support its decision herein. It was ob-

vious to us from the beginning that this Court would not hold that the weight provisions of the South Carolina law had been superseded by the Motor Carrier Act, 1935. Section 225, Motor Carrier Act, 1935, made it clear that Congress did not intend to occupy at this time that phase of interstate regulation. That is a matter on which the States may legitimately legislate. It is perhaps a field which is not of such national scope as to require uniformity of regulation. Congress having made it clear by Section 225 that it had not touched that field by merely *authorizing* investigation upon which it might base future regulation. The clear and obvious distinction between the *Barnwell* case and this case is that by Sections 206, 207, 208, 209, 210, and 211 of the Act, Congress did very clearly occupy the field with reference to certificates of convenience and necessity which would authorize the actual carrying on of operations over the highways of the States.

We may likewise dismiss from further consideration the case of *Kelly* v. *State of Washington*, 58 Sup. Ct. 87, because the very obvious distinction between that case and the case at bar is stated by this Court in the following language:

> "In the instant case, in relation to the inspection of hull and machinery, *the State touches that which the Federal laws and regulations have left untouched.*" (Emphasis ours.)

The Federal law left the question of weights of load and vehicle untouched. The Federal law, rather than leaving the question of certificates or permits untouched, very directly occupied that field. Many of the authorities cited in *Kelly* v. *State of Washington, supra*, support the contention which your petitioner is making in this case.

In every case in which state regulations have been sustained, such as the Texas Truck Law, this Court has been

careful to use the language "in the absence of national legislation" and in practically all of those cases this Court has said that "the states may act within their respective jurisdictions until the Congress sees fit to act." With reference to the issuance of certificates of convenience and necessity or permits, we may, as was done in *Gibbons* v. *Ogden, supra,* dismiss that inquiry because there is now national legislation upon the subject. This Court in *Gibbon* v. *Ogden, supra,* saying:

> "In argument, however, it has been contended that if a law passed by a state in the exercise of its acknowledged sovereignty comes into conflict with a law passed by Congress in pursuance of the Constitution they affect the subject and each other like equally opposing powers,"

and again—

> "In discussing the question whether this power is still in the states in case under consideration, we may dismiss from it the inquiry whether it is surrendered by the mere grant to Congress or is retained until Congress shall exercise the power, *we dismiss that inquiry because it has been exercised and the regulations which Congress deemed it proper to make are now in full operation. The sole question is can a State regulate commerce between foreign nations and among the states while Congress is regulating it.*" (Emphasis ours.)

The Circuit Court holds in this case that because the State has passed a law *which it might pass in the absence of Federal regulation,* that still in spite of the fact that Congress has acted, the State can still regulate the use of its highways, although the State regulation comes into direct conflict with the Federal law, as we believe we have thoroughly demonstrated, and like the *Freight Rate Taxing Cases,* 15 Wall. 232, were passed for a legitimate purpose,

yet, as construed by the Circuit Court in this case, amounts to a direct regulation of interstate commerce.

For instance, the Interstate Commerce Commission might find that public convenience and necessity and the development of that system of motor transportation necessary to the needs of the commerce of the United States and of the national defense, requires the operation of a common carrier truck-line from St. Louis, Missouri, to Houston, Texas, which would traverse the States of Missouri, Kansas, Oklahoma, and Texas, and the Interstate Commerce Commission might issue such a certificate and authorize such an operation, yet under the opinion of the Circuit Court of Appeals those States could arbitrarily block and stop that movement of interstate commerce. Or the Commission might authorize the operation of a line from Los Angeles to New York traversing the State of Texas and that entire system could be destroyed so far as any value to interstate commerce is concerned by the arbitrary action of one of the several States traversed.

This Court in *Gibbons* v. *Ogden, supra,* after stating the question "can a State regulate commerce with foreign nations and among the States while Congress is regulating it" decided that question adversely to the Circuit Court of Appeals in the following language:

> "What is this power?
>
> "*It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed, This power like all others vested in Congress is complete in itself. May be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the Constitution.*" (Emphasis ours.)

The Circuit Court's opinion *in this case would permit the States to prescribe the rule of decision and result in the superiority of State decisions over Federal decisions* and would lead only to endless conflict. If the Federal regula-

tory power and its administrative commission, the Interstate Commerce Commission, should be made a handmaiden to the State regulatory authority whereby a person operating in interstate commerce would be required to first go to the State commissions and secure their permission to operate over the highways of the States before such person could go to the Interstate Commerce Commission for authority to so operate, or if first having gone to the Interstate Commerce Commission and having received its authority would then be required to go to the States and beg their permission to operate over the highways of the forty-eight different States or any one of them, the result would be chaos.

But the Supreme Court in *Gibbons* v. *Ogden, supra,* answered this argument in the following language:

> "But the framers of our Constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the Constitution, is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. *In every such case, the Act of Congress, or the treaty is supreme; and, the law of the State, though enacted in the exercise of powers not controverted, must yield to it.*" (Emphasis ours.)

It may be admitted, therefore, that the State exercised a legitimate power in passing the Motor Truck Law, *yet,* when that *power is so exercised as to become a regulation*

of interstate commerce, and when Congress has acted as it has acted in the passage of the Motor Carrier Act, 1935, the State law must yield. The power to tax is a power which may be legitimately exercised by the States. The power to tax is the power of government preservation and supplies the very life-blood of any government, but in the case of the *State Freight Rate Tax,* 15 Wall. 232, it was held that a tax on interstate commerce was a regulation of interstate commerce, and however legitimate in its origin, that this power must give way before the paramount power of Congress in the regulation of Interstate Commerce.

The power of taxation is one most vital to any government and necessary to its preservation. We may well inquire, therefore, whether the power of the State to regulate the use of its highways is more vital and more necessary in its preservation than the power of taxation. Of course, this could not be true. When State regulation of its highways is applied in such a way as to become a regulation of interstate commerce, it must give way before the paramount powers of the Federal Constitution and laws passed pursuant thereto.

In the case of the *State Freight Tax, supra,* a tax imposed by one State upon freight transported to or from another State was held to be void as a regulation of commerce among the States on the ground that the transportation of passengers or merchandise through a State or from one State to another "was in its nature national" so that it should be subject to a uniform system or plan of regulation under the control of one regulating power. In that case the tax was not imposed for the purpose of *regulating interstate commerce,* but in order to raise revenue and would have been a legitimate exercise of an admitted power of the State if it had not been so exerted as to operate as a regulation of interstate commerce. *Any other regulation of interstate commerce applied as the tax was in that*

case, would fall within the rule of its decision. If the State has not the power to tax freight and passengers passing through it, or to or from it, from or into another State, much less would it have the power to forbid it altogether.

The case is directly in point with the case at bar in principle. The regulation of interstate commerce flowing over the highways of the various States is in its very *nature national* and should be subject to one uniform system of regulation and one regulating power, and that power is now placed, by reason of the Motor Carrier Act, 1935, in the Interstate Commerce Commission, and regardless of how legitimate may have been the exercise of the power of the State in the passage of the State's Motor Truck laws, when it is argued that interstate commerce, flowing by means of motor vehicles, may and must still be fettered by the whims of the commissions of the forty-eight States, in a prior determination of the use to be made of highways, before the Interstate Commerce Commission can act, that regulation becomes a regulation of and burden upon interstate commerce and must give way to the paramount authority of Congress to regulate as it has done.

In *Gilman* v. *Philadelphia*, 3 Wall. 713, it was said:

> *"However, this may be, the rule has been asserted with great clearness that whenever the subjects over which a power to regulate commerce is asserted are in their nature national or admit of one uniform system or plan of regulation they may justly be said to be of such a nature as to require exclusive legislation by Congress."* (Emphasis ours.)

In *Bowman* v. *Chicago & N. W. Railway Company*, 125 U. S. 465, 8 Sup. Ct. 689, the Supreme Court said:

> "Surely transportation of passengers or merchandise through a State or from one State to another is of this nature. It is of national importance that over that subject there should be but one regulating power * * *

"The power conferred upon Congress to regulate commerce among the states is indeed contained in the same clause of the Constitution which confers upon it the power to regulate commerce with foreign nations. The grant is conceived in the same terms, and the two powers are undoubtedly of the same class and character, and equally extensive. The actual exercise of its powers over either subject *is equally and necessarily* exclusive of that of the States, *and paramount over all the powers of the States; so that State legislation, however legitimate in its origin or objects, when it conflicts with positive legislation of Congress or its intention reasonably implied from its silence, in respect to the subject of commerce of both kinds must fail.*" (Emphasis ours.)

In the *Chicago & N. W. Ry. Company* case, *supra*, the Supreme Court said:

"The power to prevent embarrassing restrictions by any State was the thing desired. The power was given by the same reference and in the same clause by which was conferred power to regulate commerce with foreign nations * * * nor does it make any difference whether exchange of commodities is by land or by water."

Who can possibly deny that the regulation of the use of the highways would not prove to be *"embarrassing restrictions"* especially when the Interstate Commerce Commission in its attempted regulation of interstate commerce would thereby be subject to the whims of the regulatory bodies of forty-eight States. As stated elsewhere in this brief, such a holding would be provocative of endless conflict and would make a veritable force of regulation of interstate commerce by the Interstate Commerce Commission.

As applied strictly to the regulation of interstate commerce over the highways however, the Supreme Court of

the United States has definitely settled the case, to our minds in *Bush* v. *Malloy*, 45 Sup. Ct. 327, wherein the Court said:

> "The case presents two features which were not present in *Buck* v. *Kuykendall* * * * The first is that the highways here in question were not constructed or improved with Federal aid. This difference does not prevent the application of the rule declared in the Buck case. The Federal aid legislation is of significance not because of the aid given by the United States for the construction of particular highways, *but because these acts make clear the purpose of Congress that State highways shall be open to interstate commerce.*" (Emphasis ours.)

In *Hi-Ball Transit Company* v. *Railroad Commission*, 22 F. (2d) 425, Judge Atwell, said:

> "That the motor age has dawned does not change the law, and beginning with *Buck* v. *Kuykendall*, 267 U. S. 307, 45 Sup. Ct. 324, 69 L. Ed. 623, 38 A. L. R. 226, wherein Mr. Justice Brandeis, for the Court, said:
>
> "'Thus, the provision of the Washington statute is a regulation not of the use of its own highways but of interstate commerce * * *. *It also defeats the purpose of Congress expressed in the legislation giving Federal aid for the construction of interstate highways*'." (Emphasis ours.)

It is elementary that, though the Federal Government is limited in its scope, in the subjects committed to it, it is supreme, and the following cases exemplify that principle.

In *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370, the Court said:

> "It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a State to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on

the subject, *and ceases when Congress acts* on the subjects or manifests its purpose to call into play its exclusive power." (Emphasis ours.)

In *Chicago, Rock Island & Pacific Ry. Co.* v. *Hardwick Farmers' Elevator Co.*, 226 U. S. 426, 33 Sup. Ct. 176, it is said:

> "The elementary and long-settled doctrine is that *there can be no divided authority over interstate commerce* and that the regulations of Congress on that subject are supreme." (Emphasis ours.)

In *Erie R. Co.* v. *New York*, 233 U. S. 671, 34 Sup. Ct. 759, it is said:

> "The relative supremacy of the State and national power over interstate commerce need not be commented upon. *Where there is conflict, the State legislation must give way.* Indeed, *when Congress acts in such a way as to manifest its purpose to exercise its constitutional authority, the regulating power of the State ceases to exist.*" (Emphasis ours.)

In the case of *M. K. & T.* v. *Harris*, 234 U. S. 417, Sup. Ct. 792, it is said:

> "It is of course settled that, *when Congress has exerted its paramount legislative authority over a particular subject of interstate commerce, State laws upon the same subject are superseded.*" (Emphasis ours.)

In *Prigg* v. *Pa.*, 41 U. S. 16 (Pet.) 539, it is said:

> "If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, *it cannot be that the State legislatures have a right to interfere and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress,*

in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the same subject-matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it." (Emphasis ours.)

We especially invite the Court's attention to the quotation next above for its language is directly to the point in this case.

In *Smith* v. *Alabama*, 124 U. S. 466, 8 Sup. Ct. 564, the Supreme Court of the United States said:

"The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. *It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority.* As the regulation of commerce may consist in abstaining from prescribing positive rules for its conduct, it cannot always be said that the power to regulate is dormant because not affirmatively exercised." (Emphasis ours.)

In *Southern Ry. Co.* v. *Railroad Commission of Indiana*, 236 U. S. 439, 35 Sup. Ct. 304, the Supreme Court said:

"Without, therefore, discussing the many cases sustaining the rights of the States to legislate on subjects which, while not burdening, may yet incidentally affect interstate commerce, *it is sufficient here to say that Congress has so far occupied the field of legislation relating to the equipment of freight cars with safety appliances as to supersede existing and prevent further legislation on that subject.*" (Emphasis ours.)

We here invoke the rule that when Congress has occupied a field of interstate commerce, its laws being valid under the Federal Constitution, are the supreme law of the land, and in this case, if the question of the condition of the roads is a subject of inquiry, then the Federal authorities are supreme.

In *Washington-Oregon Company* v. *State of Washington*, 270 U. S. 87, 46 Sup. Ct. 279, the Court said:

> "In the relation of the States to the regulation of interstate commerce by Congress there are two fields. There is one in which the state cannot interfere at all, even in the silence of Congress. In the other (and this is the one in which the legitimate exercise of the State's police power brings it into contact with interstate commerce so as to affect that commerce) *the State may exercise its police power until Congress has by affirmative legislation occupied the field by regulating interstate commerce and so necessarily has excluded State action.*" (Emphasis ours.)

A reading of the opinion of the Circuit Court impresses one with the feeling that that court has either failed or refused to recognize that local police power marks the outside boundaries of the State's field of action *even in the absence of national legislation* and that when Congress undertakes to legislate within the legitimate field of interstate commerce, its authority being supreme, the police power of the State, if in conflict, must yield. *Northern Pacific Railway Company* v. *Washington*, 222 U. S. 370.

In the *Northern Pacific Railway Company* case just cited, the Supreme Court said that the right of a State to apply its police power for the purpose of regulating interstate commerce "exists only from the silence of Congress on the subject and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power."

It was for Congress to say what regulations shall be effective after August 9, 1935. Only those made effective by or under the authority of Congress are effective at all. *Northern Pacific Railway Co.* v. *Washington, supra.* In *Washington-Oregon Company* v. *State of Washington,* 270 U. S. 84, the Court in an opinion by Mr. Justice Taft rejected the contention made that pending the exertion of plant quarantine authority by the Secretary of Agriculture the Washington Quarantine Statute remained in force and the court said:

> "But when Congress has acted and occupied the field, as it has here, the power of the states to act is prevented and suspended."

Further quoting from the opinion in that case:

> "It follows that, pending the existing legislation of Congress, as to quarantine of the diseased trees and plants in interstate commerce, the Statute of Washington on the subject cannot be given application. It is suggested that the States may act in the absence of any action by the Secretary of Agriculture; that it is left to him to allow the States to quarantine and that if he does not act there is no invalidity in the State's action. Such construction as that cannot be given to the Federal statute. *The obligation to act without respect to the states is put directly upon the Secretary of Agriculture whenever quarantine in his judgment is necessary. When he does not act, it must be presumed that it is not necessary.* With the Federal law in force, State action is illegal and unwarranted." (270 U. S. at pages 102 and 103.) (Emphasis ours.)

The Federal Motor Carrier Act, 1935, to our minds leaves no room for doubting the intention of Congress to completely occupy the field of interstate commerce by motor vehicles except as to those matters expressly excluded by

Section 225 Motor Carrier Act, 1935. The fact that Congress may not have chosen to regulate in the minutest detail every phase of interstate motor carrier operations does not signify that it was the intention of Congress that the State regulatory power should survive the occupancy of the field by the National Government.

It may no longer be said that Congress remains silent. *The interruption of its silence effects an occupancy of the field in which Congress is supreme.* It supersedes and puts an end to State legislation in so far as it affects interstate commerce.

In *Missouri Pacific* v. *Porter,* 273 U. S. 341 (345 and 346), 4 Sup. Ct. 383, citing much authority for the statement, the Supreme Court of the United States said:

> "*Congress must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient and that no other regulation is necessary.* Its power to regulate such commerce and all its instrumentalities is supreme; and, as that power has been exerted, State laws have no application. They cannot be applied in coincidence with, as complementary to or as in opposition to, Federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction." (Emphasis ours.)

We recognize that unless an act of Congress, when fairly interpreted, comes plainly in conflict with State regulation the general rule is that the intention wholly to exclude State action will not be implied; but, where, as here, the conflict is plain, the intention to supersede State action need not be expressed.

The Supreme Court of the United States in *International Shoe Company* v. *Pinkus,* 278 U. S. 261 (265), has said:

> "The purpose to exclude State action for the discharge of insolvent debtors may be manifested without

specific declaration to that end; that which is clearly implied is of equal force as that which is expressed. (Citing cases.) * * * In respect of bankruptcies the intention of Congress is plain. *The national purpose to establish uniformity necessarily excludes State regulation.* It is apparent, without comparison in detail of the provisions of the Bankruptcy Act with those of the Arkansas Statute, that *intolerable inconsistencies and confusion would result* if that insolvency law be given effect while the National Act is in force." (Emphasis ours.)

The identical same thing may be said with equal emphasis with reference to the Federal Motor Carrier Act, 1935, and the Texas Motor Truck Law as it affects interstate commerce.

Section 202 of the Federal Motor Carrier Act, 1935, designated as "Declaration of Policy and Delegation of Jurisdiction," makes it plain beyond mistaking that Congress intended that interstate motor carriers should be regulated by the administration and enforcement of such act, complemented or supplemented by no State law.

Ample and complete power to administer the Motor Carrier Act, 1935, in keeping with the interests of the public in safety of the highways and the preservation thereof is bestowed upon the Interstate Commerce Commission under the Motor Carrier Act, 1935. Any other holding would amount to a granting of plenary power to the State which would burden and block the flow of interstate commerce.

The term "certificate of public convenience and necessity" is undoubtedly a comprehensive term and comprehends more than merely a determination of the question of the need of the service; it comprehends also a consideration of the structure and preservation of the highways and the safety of the public thereon. If this is the correct interpretation of the expression "certificate of public convenience and necessity"

then clearly under the provisions of the Motor Carrier Act, 1935, the Interstate Commerce Commission must consider those matters in passing upon and acting upon an interstate application. We conclude that it is a correct conception of the expression because our Court of Civil Appeals in *Railroad Commission of Texas* v. *Shupee*, 57 S. W. (2d), 295, quotes with approval from 42 C. J. 687 as follows:

> "*In determining what constitutes public convenience and necessity in a particular case* and the propriety of granting a certificate to that effect, the public service commission *may properly take into consideration the element of danger involved by the use of heavy trucks and passenger cars on highways.* The adequacy of the service rendered in the same territory by other carriers, if any, and also the ability of applicant, adequately, to render the service needed." (Emphasis ours.)

In the *Shupee* case, Judge Blair also quoted with approval the language of the Supreme Court of Florida in the case of *Seaboard Air Line Ry. Co.* v. *Wells*, 100 Fla. 1631, 131 Southern 777 (783), as follows:

> "The purpose of the statute is not only to regulate the use of the public highways by motor vehicles for compensation or hire but *in order to conserve the public roads and the safety of the traveling public thereon* to exclude from the use of the public highways in the State any and all motor vehicles operated for compensation *except such motor vehicles as are affirmatively shown to be required to serve the public convenience and necessity.*" (Emphasis ours.)

The Interstate Commerce Commission has apparently so interpreted the act as giving it authority to consider questions involving the use of the highway from the standpoint of safety and use in *Moe Gollock for Extension for Operations*, 1 M. C. C. 161. The protestants submitted evidence

to show that during certain summer months a large volume of traffic moved over a portion of the proposed route. The Commission refused to deny the application on this ground saying that the protestants had not demonstrated that the highway is incapable of bearing an added volume of traffic equal or greater than that which would result from the proposed operation.

Furthermore, Sections 204-(a)-(1)-(2)-(3) each specifically enter the field of regulation with reference to safety of the highways and make specific provisions pertaining to hours of employment and safety of operation and equipment. The Commission has entered upon the discharge of these duties and in this connection reference is here made to Interstate Commerce Commission report in Ex Parte No. M. C. 4, Motor Carrier Safety Regulations in the matter of qualification of employees in safety of operation and equipment of common carriers and contract carriers by motor vehicle, and reference is also made to Ex Parte M. C. 2 report of the Commission with reference to maximum hours of employment of drivers. In view of the provisions of the act having reference to safety and use of the highways, may it not be said that "Congress must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient and that no other regulation is necessary," *Missouri-Pacific* case, *supra*, and especially so when we bear in mind that the regulation of interstate commerce consists *as much in negative as in positive action, Passenger cases, supra*, and that Congress might have been influenced by a *"judicious policy."* The regulation of interstate commerce is not left open to the States merely because Congress has not seen fit to exhaust in detail the possibilities of regulation to the utmost.

The Interstate Commerce Commission has rejected the idea that its certificates of convenience and necessity issued pursuant to the Motor Carrier Act, 1935, do not authorize

operation over the highways, and has rejected the idea that a holder of a certificate issued by the Interstate Commerce Commission is not authorized to operate. In the case of *In re Slagle*, 2 M. C. C. 127 the Interstate Commerce Commission has written a very able opinion, and its interpretation of the law is entitled to considerable weight. In the *Slagle* case, the Commission has said:

> "Prior to the passage of the Act, most of the states had undertaken to regulate to some extent motor carriers engaged in intrastate commerce, and some had undertaken to extend the regulation in various respects to those engaged in interstate or foreign commerce. There were a great variety of such laws and like variations in enforcement. Enforcement was vigorous in some states and lax in others, and, as was natural, laxity was more prevalent as to interstate operations. In the absence of Federal regulation the situation was a most difficult one for the states which was one of the reasons why their regulatory authorities very generally favored such regulations. The records show that Congress was fully informed in regard to this situation. It might readily, in clear and unmistakable language, have made compliance with State laws a prerequisite to rights under the 'grandfather' clauses, and have indicated how we could determine the fact of compliance or non-compliance. This, however, it did not do. Instead, it employed the phrase '*bona fide*' operation, making registration 'under any code of fair competition' evidence of such operation on June 1, 1935, but saying nothing about state laws, which were not mentioned in committee reports or debates in connection with the phrase '*bona fide operation.*'
>
> "At two places in the Act, Congress made specific provision for compliance with state laws as a prerequisite to obtaining a privilege. Under Section 203 (b)(8) a carrier of passengers is not entitled to an exemption that he might otherwise be accorded unless he is 'lawfully engaged in the intrastate transportation of passengers in accordance with the laws of each state

having jurisdiction.' Under Section 206(a) a carrier who has procured a certificate under state laws authorizing intrastate common carrier service is relieved of the requirement of making proof of public convenience and necessity for conducting the same operation in interstate commerce. It seems unlikely that if Congress had intended to make compliance with State laws a condition precedent to 'grandfather' privileges, it would have failed to make the same specific provisions that it did in respect to other privleges."

The trial court found that your petitioner had complied with every applicable provision of the Texas law, except the alleged requirement for a certificate and we most respectfully submit that that requirement, if it existed, has been entirely superseded by the Motor Carrier Act, 1935.

In connection with this argument, it is our further contention that the Railroad Commission of Texas has never had the authority under the Texas Motor Truck law to require of a purely interstate operator that he have a certificate of convenience and necessity or permit issued by the Railroad Commission, and if this contention be correct then obviously the decision of the Circuit Court of Appeals in this case is erroneous.

The fact that the Railroad Commission could not require of a purely interstate operator a certificate of public convenience and necessity was early made clear in a mass of litigation which followed the passage of the Texas Motor Truck Law. In the case of *Sage* v. *Baldwin*, 55 Federal (2d) 968 in which Judge Atwell, writing for a three-judge court, it is said:

"Preserving, therefore, the rights of the state and the right of the nation, the respondents will be enjoined from interfering with the operation of the complainants or from arresting them for alleged violations of this law, so far as any rates may be concerned, or so far as any bond securing any shipper may be con-

cerned, *or so far as any certificate of public convenience and necessity may be concerned.*" (Emphasis ours.)

The Railroad Commission of Texas in passing upon an application under the Texas Motor Truck law may not in any event require such applicant to prove convenience and necessity. That fact is well established in *Buck* v. *Kuykendall, supra; Bush* v. *Malloy, supra; Michigan Public Utilities Commission,* v. *Duke,* 266 U. S. 570; *Smith* v. *Cahoon,* 75 L. Ed. 1264, as well as the *Sage* v. *Baldwin* case, *supra, Galveston Truck Line* v. *Allen,* 2 Fed. Supp. 488, 53 Sup. Ct. 694.

The Railroad Commission of Texas has that power and only that power which has been delegated to it. *State* v. *Sugarland,* 163 S.W. 1047; *Harris* v. *Municipal Gas Company,* 59 S.W. (2d) 355; *Dancigar Oil & Rfg. Co.* v. *Railroad Commission,* 49 S. W. (2d) 837, and *Railroad Commission of Texas* v. *MacMillan,* 51 F. (2d) 400. The rule is stated in 34 Texas Jurisprudence 340, as "public officers and governmental and administrative boards possess only such powers as are expressly conferred upon them by law or are necessarily implied from the power so conferred." If there is any statute within the State of Texas which requires an interstate common carrier by motor vehicle to have any kind of a certificate or permit, it must be found in the Texas Motor Truck law, Art. 911(b), Vernon's Annotated Civil Statutes, 1925, Acts 1931, 42nd Legislature, p. 480, Ch. 277. This question may best be determined by assuming a criminal prosecution.

If an interstate operator without a certificate issued by the Railroad Commission of Texas is violating the law of the State of Texas, then where must he go to find the law. The Texas statutes provide in Art. 3 of the Penal Code as follows:

"Art. 3. Penalties must be affixed by written law. In order that the system of penal law in force in this State may be complete within itself, and that no system of foreign laws, written or unwritten, may be appealed to, it is declared that no person shall be punished for any act or omission, unless the same is made a penal offense, and a penalty is affixed thereto by the written law of this State."

Now we contend that there is no Texas law requiring an nterstate operator to have a certificate or permit from the tate of Texas.

Looking now to the written law of the State (Texas lotor Truck Law, Art. 911(b) and Art. 1690(b) of the enal Code), we find that common carrier motor carriers re required to have a *particular* kind of instrument and we nd that this *particular* kind of instrument is the *only* kind f an instrument that is required. The only provision in ne written law requiring a motor carrier to have any kind f an instrument in the form of a certificate of convenience nd necessity as a prerequisite to his right to operate in is State is found in Section 3 of Art. 911(b), *supra*, and at section in part reads:

"Section 3. No motor carrier shall after this Act goes into effect operate as a common carrier without first having obtained from the Commission, under the provisions of this Act, a certificate of convenience and necessity *pursuant to a finding to the effect that the* public convenience and necessity require such operation," etc.

Thus, the law of this State contains only one obstacle a common carrier motor carrier's operation and that is e requirement that as a prerequisite to the exercise of e right he must obtain a certain, definite, and particular nd of an instrument from the Railroad Commission of

Texas, namely, a certificate; and this certificate must be of a particular kind, namely, a certificate of public convenience and necessity, and it must have been issued under particular conditions, namely, "*pursuant to a finding that the public convenience and necessity require such operation.*"

Otherwise, the statute is silent.

Suppose a criminal prosecution. We will suppose that the State of Texas desires to proceed against your petitioner here for operating over the highways of this State without having obtained that particular kind of an instrument which the statute requires. The complaint would necessarily have to be in substance that on or about a certain date your petitioner did then and there operate over a certain highway of this State as a common carrier motor carrier "without first having obtained from the Commission * * * *a certificate of public convenience and necessity, pursuant to a finding to the effect that public convenience and necessity require such operation.*" 1 Code Criminal Procedure, 1925, Art. 396.

Now the State could of course file such complaint and make such allegation, but it would be utterly unable to prove the allegations of the complaint and it would necessarily fall because, under the decisions cited hereinabove, the Commission can not require proof of convenience and necessity and never since the *Galveston Truck Line* case, 289 U. S. 708, 53 Sup. Ct. 694, 77 L. Ed. 1463 has the Railroad Commission of Texas ever attempted to require an interstate operator to prove convenience and necessity. The Railroad Commission of Texas is simply wholly without any authority to require of an interstate operator any form of certificate or permit.

Referring directly to the burden of the Circuit Court of Appeals argument, as set out in its opinion, we quote from

Hannibal & St. Joseph R. R. Co. v. *Husen*, 95 U. S. 527, 5 Otto 465:

> "Neither the unlimited powers of a state to tax nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon Congress by the Constitution. Many acts of a state may, indeed, affect commerce, without amounting to a regulation of it, in the constitutional sense of the term. And it is sometimes difficult to define the distinction between that which merely affects or influences *and that which regulates or furnishes a rule of conduct.*" (Emphasis ours.)

To permit the States to have the final say as to when interstate commerce shall move over their roads as the Circuit Court of Appeals says in this case, would "work a practical assumption of the powers properly conferred upon Congress by the Constitution." That cannot be successfully disputed. To permit the States to have the final say as to when interstate commerce shall move over their highways as the Circuit Court of Appeals has said, would be for the States to set up and furnish the rule of conduct. This is no such case, therefore, as involves any difficulty in distinguishing between "that which merely affects or influences and that which regulates or furnishes a rule of conduct."

POINTS C and D.

Your petitioner, being in operation on June 1, 1935, and having filed his application within the time required by law, is entitled to continue to operate until his application is either granted or refused by the Interstate Commerce Commission.

Your petitioner filed his application with the Interstate Commerce Commission for an interstate certificate within the time fixed by the Motor Carrier Act, 1935 (R. 36), and

was therefore entitled to continue to operate until t
Interstate Commerce Commission either granted or deni
the application. This was a right directly conferred up
your petitioner by the affirmative language of Section 20
Motor Carrier Act, 1935, which Section provides that
common carrier by motor vehicle shall engage in intersta
or foreign commerce on any public highway unless su
carrier has a certificate of convenience and necessity issu
by the Interstate Commerce Commission, and then provid
that if any carrier or his predecessor in interest was
bona fide operation as a common carrier on June 1, 19
and filed an application within 120 days after Section 2
took effect that "pending the determination of any such a
plication the continuance of such operation shall be lawful
Your petitioner was, therefore, as a matter of law, entitl
to continue to operate until the application filed with t
Interstate Commerce Commission was either granted
denied. That is the construction which our own courts,
well as the courts of other States, have placed upon t
Texas Motor Truck Law and the Motor Carrier Act, 193
and exactly such a case as the case at bar was present
to the Supreme Court of Texas in *Greyhound Lines* ca
supra, and was presented to the Court of Civil Appeals
Texas in *Railroad Commission et al.* v. *Bates et al.*, 1
S. W. (2d) 286.

Without repeating, we here refer to quotations from tho
two cases found on pages 19 and 20 of this brief. T
Bates case, *supra*, held that the Motor Carrier Act, 193
vested the Interstate Commerce Commission with exclusi
authority to pass on applications of motor carriers engag
exclusively in interstate commerce on highways for ce
tificates of public convenience and necessity, and supe
seded the Texas Motor Truck Law. In that case it w
held that the State Railroad Commission need not gra
a certificate of convenience and necessity pending an a

plication to the Interstate Commerce Commission for permenent certificate, notwithstanding the fact that such a carrier could continue already begun interstate operations. It also held that the Texas Railroad Commission could not require a motor carrier engaged exclusively in interstate commerce to obtain a State certificate or permit during the pendency of such application to the Interstate Commerce Commission for certificate of convenience and necessity.

In the *Bates* case the Court of Civil Appeals affirmed a temporary injunction granted by the District Court of Travis County enjoining the Railroad Commission of Texas and its agents from interfering with Bates in the operation of twelve trucks carrying exclusively interstate commodities over certain highways in Texas, Bates having no Texas certificate or permit issued by the Railroad Commission. There, just exactly as petitioner here, Bates was operating trucks in interstate commerce over highways in Texas under and by virtue of his (Bates) application under the so-called grandfather provision of Section 206, Motor Carrier Act, 1935. In the *Bates* case, as here, the respondents contended that notwithstanding the Motor Carrier Act, 1935, the Texas Commission had authority and jurisdiction to require motor carrier common carriers engaged in carrying interstate commodities exclusively to apply for and obtain certificates of convenience and necessity from the State Commission and that the State Commission still had the authority to deny such certificates or permits, if necessary, for the protection of the State's highways, or for the safety of the public in the use of them. In direct reply to this contention, the Court of Civil Appeals at Austin said:

> "This question was necessarily decided against the contention of appellants by the Supreme Court in the case of *Southwestern Greyhound Lines* v. *Railroad Commission*, 99 S. W. (2d) 263."

In *State ex rel L. & L. Freight Lines, Inc.*, v. *Douglass*, *supra*, the Supreme Court of Florida, said:

> "The holding of this court in the last cited case is that, since the enactment of the Federal Motor Carrier Act of 1935, Congress has vested in the Interstate Commerce Commission of the United States sole and exclusive jurisdiction to investigate and determine the necessity for an interstate motor carrier operation; that it is possessed of exclusive authority to initially grant a certificate of public convenience and necessity to engage in such exclusive motor carriage operation. This being true, the Railroad Commission has no jurisdiction whatsoever in the matter of granting or denying applications for certificates of public convenience and necessity for exclusively interstate motor carrier operations until the interstate motor carrier applicant shall have first applied for and obtained from the Interstate Commerce Commission a federal certificate of public convenience and necessity for the operation of motor vehicles exclusively in interstate commerce. In the last mentioned instance, the Railroad Commission of Florida, after the award of certificate of public convenience and necessity by the Interstate Commerce Commission, is required to grant to a carrier upon proper application therefor a state certificate which will enable the Florida Railroad Commission to enforce against the interstate operation all of the police regulations applicable to the same which are required to be enforced pursuant to the terms of the State law in the premises."

Notwithstanding the Commerce Clause of the Federal Constitution and notwithstanding the well-known fact that the Federal Government has expended for the construction in Texas of a system of Federal Highways a vast sum of money, the appellants insist here in their brief that Texas owns such highways and has the right, irrespective of the Act of Congress, to exercise the jurisdiction of saying to an interstate carrier whether such roads are in

uch condition physically and whether the amount of traf-ic thereon is such as to authorize interstate operation, as f the States had not in the Commerce Clause many years go, dedicated their highways and rivers to the unob-tructed flow of interstate traffic under the exclusive regu-ation and control of Congress.

Even if the State itself had furnished every dollar for he construction of the roads used by petitioner here, such ight to stop McDonald would not exist in the State, let lone in an administrative agency of the State deriving ts power solely from statutory enactment. A complete nswer to appellants' contention, we believe, is set forth in he opinion of Circuit Judge Parker in the three-judge ase of *Barnwell Bros.* v. *South Carolina State Highway Department, supra,* and in that case Judge Parker said:

> "Under our dual governmental system the control of the highways is committed to the states, whereas the control of interstate commerce passing over those highways is committed to the Federal Government; and since the decision in *Gibbon* v. *Ogden* it has been settled that the states may not in their control of the highways burden or interfere with the free flow of interstate commerce, the regulation of which has been entrusted to Congress. This would not be doubted if the highways in question were a navigable river, but the principle is the same whatever the character of the highway over which the interstate commerce moves. Thus, the federal power extends over artificial waterways constructed by the states and over a railroad handling cars moving in interstate commerce, although the railroad has been constructed and is being operated by one of the states (*U. S.* v. *State of California,* 297 U. S. 175, 56 Sup. Ct. 421, 80 L. Ed. 567). And when a state builds *a road as a highway of commerce, it cannot burden the flow over it of commerce interstate in character* (citing cases). (Emphasis ours.) (Reversed but not on this holding.)

In *State ex rel. R. C. Motor Lines* v. *Florida Railroad Commission,* 123 Fla. 345, 166 So. 840, the Supreme Court of Florida said:

> "Under the United States Constitution, the commerce clause (clause 3, sec. 8, art. 1) *ex proprio vigore* amounts to a national certificate of public convenience and necessity for the free and untrammelled carrying on by every one of interstate commerce, and of interstate carriage pertaining thereto, and only Congress has the legislative power to prescribe special conditions, limitations, and restraints upon the *prima facie* constitutional right of every person to freely engage in interstate commerce as a matter of national convenience and necessity for the welfare of the Union, absent any special federal legislative provisions of law providing for the special licensing of particular individuals to carry on such interstate commerce or conduct carriage operations pertaining thereto."

Inasmuch as it seems obvious that the Motor Carrier Act, 1935, superseded the Texas Motor Truck Law, in so far as any requirement for certificate or permit of any kind is concerned, then it seems equally obvious and must follow as a matter of course, that your petitioner was entitled to the benefit of the right conferred upon him by Section 206 Motor Carrier Act, 1935, and was entitled to continue to operate over the highways until the Interstate Commerce Commission had passed upon his application and had either granted or denied it. The trial court was therefore manifestly correct in granting its permanent injunction against the respondents here, together with all their agents, servants, or representatives, and in permitting your petitioner to continue to exercise the right and enjoy the benefit of the right conferred upon him by the Act of Congress known as the Motor Carrier Act, 1935.

Jurisdiction having attached in the Interstate Commerce Commission, it was exclusively in the province of that

Commission to pass upon the question of the *bona fides* of your petitioner's application and to either grant or refuse him a certificate of convenience and necessity. *Great Northern Ry. Co.* v. *Merchants Elevator Company,* 259 U. S. 285, 42 Sup. Ct. 477, and cases annotated at page 480 of the Supreme Court Reporter. *Atlantic Coast Line Ry. Co.* v. *Hampton,* 80 Fed. Sup. 797 (800-801). Incidentally, it may be said that the Interstate Commerce Commission, through its Joint Board, has found that your petitioner here was in *bona fide* operation on June 1, 1935, and continuously since, and has recommended the entry of an order granting your petitioner a certificate of convenience and necessity. The trial court found that your petitioner was in *bona fide* operation on June 1, 1935 (R. 38).

It may also be very frankly stated here, that there is no dispute about any of the facts established in this case—the respondents here simply contend that your petitioner was not in *bona fide* operation, although actual operation and actual compliance with all police requirements were not disputed, except on the ground that your petitioner had no certificate or permit issued by the Railroad Commission of Texas, and the respondents here contend that your petitioner could not lawfully operate unless he had a State certificate. We do not think the question of the *bona fides* of petitioner's operation in Texas is a matter to be considered by this Court, *Great Northern Ry. Co.* case, *supra,* and *Atlantic Coast Line Ry. Co., supra,* but if the question of the *bona fides* of petitioner's operation is regarded as of any importance, then we could not nearly argue that case so well as it has been determined by the Interstate Commerce Commission in *In re Slagle* case, 2 M. C. C. 127, and in which the Commission found that compliance with State laws was not essential to a *bona fide* operation and in which Slagle was granted a certificate by the Commission authorizing his operation.

There is no question in this case concerning such ordinary police requirements as weight of load or other requirements of Texas laws regarding safety of equipment. There never was any such question in this case. Neither is there any question here as to the right of your petitioner to operate except as that right may be determined by some official action of the Interstate Commerce Commission upon the application before it.

WHEREFORE your petitioner prays that the petition for *certiorari* be granted; that the judgment of the Circuit Court of Appeals be in all things reversed, and that of the trial court herein be in all things affirmed.

T. S. CHRISTOPHER,
LLOYD E. PRICE,
Attorneys for Petitioner.

APPENDIX A.

Texas Motor Truck Law, Acts 1931, 42nd Legislature, page 480, chapt. 277:

COMPLIANCE WITH ACT BY MOTOR CARRIERS.

SEC. 2. No motor carrier, as defined in the preceding section, shall operate any motor propelled vehicle for the purpose of the transportation or carriage of property for compensation or hire over any public highway in the State except in accordance with the provisions of this Act; provided, however, that nothing in this Act or any provision thereof shall be construed or held to in any manner affect. limit or deprive cities and towns from exercising any of the powers granted them by Chapter 147, pages 307 to 318, inclusive, of the General Laws of the State of Texas passed by the 33rd Legislature or any amendment thereto.

CERTIFICATE OF CONVENIENCE AND NECESSITY.

SEC. 3. No motor carrier shall, after this Act goes into effect, operate as a common carrier without first having obtained from the Commission, under the provisions of this Act, a certificate of public convenience and necessity pursuant to a finding to the effect that public convenience and necessity require such operation. No motor carrier shall, after this Act goes into effect, operate as a contract carrier without first having obtained from the Commission a permit so to do which permit shall not be issued until the applicant shall have in all things complied with the requirements of this Act.

SUPERVISION AND REGULATION BY COMMISSION.

SEC. 4. (a) The Commission is hereby vested with power and authority and it is hereby made its duty to supervise and regulate the transportation of property for compensation or hire by motor vehicle on any public highway in this State, to fix, prescribe or approve the maximum or minimum or maximum and minimum rates, fares and charges of each motor carrier in accordance with the specific provision

herein contained, to prescribe all rules and regulations necessary for the government of motor carriers, to prescribe rules and regulations for the safety of operations of each of such motor carriers, to require the filing of such monthly, annual, and other reports and other data of motor carriers as the Commission may deem necessary, to prescribe the schedules and services of motor carriers operating as common carriers, and to supervise and regulate motor carriers in all matters affecting the relationship between such carriers and the shipping public whether herein specifically mentioned or not.

ART. 1690a. VIOLATION OF ORDERS (PENAL CODE).

(a) Any officer, agent, servant, or employee of any corporation and every other person who violates or fails to comply with, or who procures, aids, or abets in the violation of any provisions of this Act (Civ. St. Art. 911a; P. C. 1690a) shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not to exceed Five Hundred ($500.00) Dollars, or by punishment in the county jail not exceeding one year, or by both such fine and imprisonment; and the violations occurring on each day shall each constitute a separate offense.

(b) Any officer, agent, servant, or employee of any motor bus company as heretofore defined, and any motor bus company as heretofore defined and/or the owner or operator, officer, servant, agent or employee, or any such owner or operator of any bus terminal who violates or fails to obey, observe or comply with any order, decision, rule, or regulation, direction, demand or requirement of the Commission shall be subject to and shall pay a penalty not exceeding Five Hundred ($500.00) Dollars, for each and every day of such violation. Such penalty to be recovered in any court of competent jurisdiction in Travis County, Texas, or in the County in which the violation occurs. Suit for such penalty or penalties shall be instituted and conducted by the Attorney General of the State of Texas, or by the county or district attorney of the county in which the violation occurs, in the name of the State of Texas, and by direction of the Railroad Commission of Texas.

(c) Upon the violation of any provisions of this Chapter, or upon the violation of any rule, regulation, order or decree of the Commission, promulgated under the terms of this Act (Civ. St. Art. 911a; P. C. 1690a), any district court of Travis County, Texas, or any district court of any county where such violation occurs, shall have the power to restrain and enjoin the person, firm or corporation so offending from further violating the provisions of this Act (Civ. St. Art. 911a; P. C. 1690a), or from violating the rules, regulations, orders and decrees of the Commission. Such injunctive relief may be granted upon the application of the Commission or upon the application of any person authorized by it to act, or upon the application of any "motor bus company" holding a certificate of convenience and necessity over the route affected, and against any "motor bus company" violating the provisions of this Act (Civ. St. Art. 911a; P. C. 1690a) and not holding a certificate over such route and attempting to operate or operating over said route. Such relief may be granted in suits for penalties as provided in sub-division (b) of this Section, but a suit for penalty shall not be a condition precedent to the injunctive relief provided by this Section.

(d) Any authorized inspector for the Commission shall have the power and authority to make arrests for the violation of this Act (Cv. St. Art. 911a; P. C. 1690a), coming under his observation, but such authority to make arrests shall be confined solely to the violations of this Act (Civ. St. Art. 911a; P. C. 1690a), provided, further that it shall be the duty of all law enforcement officers of this State to enforce the provision of this Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

NO. 362 55

A. E. McDONALD,
Petitioner

vs.

ERNEST O. THOMPSON, ET AL.,
Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM McCRAW,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

NO. 1052

A. E. McDONALD,
Petitioner

vs.

ERNEST O. THOMPSON, ET AL.,
Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE

This case reached the United States Circuit Court of Appeals by an appeal by E. O. Thompson, C. V. Terrell and Lon A. Smith, constituting the Railroad Commission of Texas, and Walton D. Hood, W. B. Renfro and Tom Miller, employees of the Railroad Commission of Texas, from a final decree (R-42-45) of the District Court of the United States for the Northern District of Texas, restraining the Respondents individually and in their official capacities, and their agents, servants, representatives and em-

ployees, from causing, either directly or indirectly, in any way the molestation, arrest or interference with the drivers of Petitioner's trucks, and from in any way impeding, or interfering with Petitioner's business in the transportation of property in interstate commerce in any manner whatsoever. On April 12, 1938 the Circuit Court of Appeals reversed the judgment and remanded with instructions to dismiss the bill, (See Thompson et al v. McDonald, 95 Fed. (2d) 937, R. 159-170), and thereafter Petitioner filed his Petition for Writ of Certiorari in this Court.

Petitioner in his Bill of Complaint alleged that he had been regularly operating in interstate commerce by motor vehicle for hire for many years prior to June 1, 1935, and at all times since that date and was prior to said date, and is now, engaged in the business of transporting property by motor vehicles through and between the States of Texas and Oklahoma, and between intervening points situated in different states; that in engaging in such transportation he had used within the State of Texas Federal Highways Nos. 75, 77, 80, 81, 290, 90 and 281, which are federal aided highways; that by an Act of Congress, known as the Motor Carrier Act of 1935, the sole and exclusive power, jurisdiction and authority to regulate transportation in interstate commerce has been vested in the Interstate Commerce Commission; that under the provisions of said Act he had applied to the Interstate Commerce Commission for a certificate of public convenience and necessity, and would be entitled to receive such certificate

as a matter of right under what is known as the Grandfather Clause; that the jurisdiction over, and regulation and control of his business was now exclusively in the Interstate Commerce Commission; that by reason of his application for permit under the Grandfather Clause he was entitled to continue in the transportation of property as a common carrier without a certificate or permit until such time as the Interstate Commerce Commission may act upon his application; that the Railroad Commission of Texas refused to issue to him license tags or numbers that are required to be affixed by all motor vehicles carrying property in the transportation business as common carriers in the State of Texas, and have issued orders and instructions to arrest all drivers and stop all trucks of Petitioner, because Petitioner had no permit from the Railroad Commission of Texas to operate; that he had been engaged exclusively in the transportation of property in Interstate Commerce for a long time prior to June 1, 1935, and had built up a lucrative transportation business; that his drivers had been arrested by the employees of the Railroad Commission of Texas and his business had been hindered and interfered with by said Commission, and its agents, servants, and representatives (R-1 to 18).

The Judge of the United States District Court, for the Northern District of Texas, Fort Worth Division, on the sworn Bill of Complaint of Petitioner filed January 17, 1936, on that date issued a temporary restraining order citing Respondents to ap-

pear on the 24th day of January, 1936 to show cause why a temporary injunction should not be granted (R-17, 18, 19).

On the 24th day of January, 1936, the Respondents filed a Motion to Dismiss the Bill of Complaint (R-19-22) and on the 30th day of April, 1936, filed their First Amended Answer (R-22-32).

The trial Court found as facts in the case that the Respondents had caused the arrest of Petitioner's truck drivers and had delayed and tied up Petitioner's trucks and have filed criminal complaints against Petitioner's drivers and threatened and will continue to interfere with and put a stop to Petitioner's operations (R-35); that for a long time prior to June 1, 1935, and at all times since Petitioner has been continuously in bona fide operation engaged in the business of transporting property for hire over the highways of Texas and Oklahoma exclusively in interstate commerce (R-35); that in such transportation he uses highways designated as federal highways, Nos. 75, 77, 80, 81, 290, 90 and 281; that all of the highways used by Petitioner are federal aided highways except a portion of No. 281 (R-35-36); that Petitioner had filed his application with the Interstate Commerce Commission for a certificate and had filed his tariffs and rates with the Interstate Commerce Commission, and had on file with the Railroad Commission of Texas public liability and property damage insurance (R-36); that he did not transport property in intrastate commerce (R-36); that all of his trucks had been regis-

tered in the State of Texas and are in good mechanical repair. *The trial Court concluded as a matter of law that the Motor Carrier Act of 1935 superseded the Texas Motor Truck laws insofar as said Texas laws give to the Railroad Commission of Texas power to forbid the use of federal highways by Petitioner's trucks when engaged exclusively in the transportation of property in interstate commerce* (R-37-38). It further concluded that the definition of bona fide operator in the Motor Carrier Act relates to the actual, physical, continuous and regular operation of such carrier, and further concluded, as a matter of law, that Petitioner was in bona fide operation on and prior to June 1, 1935, and has been continuously in such operation since said date, and that Petitioner has complied with all applicable police requirements of the State of Texas (R-37-38). On the 13th day of October, 1936, on motion made the trial Court amended its decree so as to recite that Respondents Motion to Dismiss had been overruled and proper exception taken, and that all proofs offered in evidence of January 25, on hearing of preliminary injunction would be considered as in evidence on trial on the merits, at which time the respective parties offered their additional proofs, upon which the court based its judgment (R-42-45). The Respondents offered in evidence their First Amended Answer and attached Exhibits "A" to "I," verified by Tilden L. Childs (R-22-33; R-152), said Exhibits being a part of said Answer, which Exhibits it was agreed should be forwarded to this Court as a part of the Record (R-138), and which are on file in this Court. From this affidavit of Tilden L. Childs,

and the Exhibits attached thereto as a part thereof, the following facts appear, as set out in Respondents' Amended Answer, introduced in evidence:

1. That in 1934 Petitioner secured from the Railroad Commission of Texas his Special Commodity Carrier Permit to haul only livestock distributed by the Agricultural Department of the State of Texas between Texas points, which said Special Commodity Permit was on October 25, 1934, cancelled by the Railroad Commission of Texas (R-26 and Respondents' Original Exhibits A and B).

2. That in May, 1934, Petitioner filed an application with the Railroad Commission of Texas for a certificate as a common carrier in interstate commerce. A hearing was had upon said application, testimony heard, and Order entered July 14, 1934, denying same (R-26-27 and Respondents' Original Exhibits C, D, & E).

3. That thereafter Petitioner filed in the District Court of Travis County an appeal from said Order denying his application and secured an injunction against the Commission from interfering with his operations, from which judgment the Respondents appealed to the Court of Civil Appeals, 3rd Judicial District, which said Court reversed the judgment of the trial Court and dissolved the injunction and at the time of the final hearing of this cause the time for filing a Motion for Rehearing had expired, and the judgment of the Court of Civil Appeals dissolving the injunction became final. The opinion of the

Court of Civil Appeals dissolving this injunction is reported in 90 S. W. (2d) 581 (R-27 and Respondents' Original Exhibits F, G, H, & I).

4. While said appeal was pending in the Court of Civil Appeals Petitioner filed with the Railroad Commission of Texas another application for a common carrier certificate to engage in intrastate commerce (R-28 and Respondents' Original Exhibit J).

5. Petitioner was never authorized to use the highways of Texas by permit or certificate or otherwise from the Railroad Commission of Texas, except the Special Commodity Permit granted March 30, 1934 and cancelled October 25, 1934 (R-29-30).

6. The Order of the Railroad Commission of Texas denying the application of Petitioner for a certificate as a common carrier in interstate commerce made specific *findings of fact upon which the denial was based as to the use of the highways generally by trucks, and denied such permit on the ground that the use of the highways would place an undue burden upon the physical properties of the highways themselves, and would endanger public safety and would interfere with the use thereof by the public* (R-29-30 and Respondents' Original Exhibit E).

7. That Petitioner's operations have not been under any certificate or permit granted by the Railroad Commission of Texas but under the protection of an injunction issued by the District Court of

Travis County and dissolved by the Court of Civil Appeals as shown above, and he has never operated under any permit or authority of the Railroad Commission of Texas, except the Special Commodity Permit which was cancelled October 25, 1934 (R-28).

8. *That should Petitioner file his application to use the highways in his alleged exclusive interstate transportation business, the Railroad Commission of Texas would only require him to prove highways were capable of withstanding such transportation business and that traffic thereon would permit; and would not require him to show convenience and necessity or consider adequacy of existing transportation facilities or the effect such proposed operation would have on existing transportation facilities and upon showing that the "highways proposed to be used by him are capable of withstanding proposed use without undue injury and damage to said highways and without unreasonable interference with the use of said highways by the general public for ordinary purposes," it would authorize him to operate over such highways* (R-32).

OBJECTIONS TO PETITION

Respondents suggest that said petition wholly fails to point out specifically the errors committed by the Circuit Court of Appeals; or the points of law decided contrary to weight of authority; or points of law decided contrary to the decisions of the Supreme Courts of Texas and Florida; or the points of

law decided contrary to the decision of the Court of Civil Appeals of Texas (3rd Judicial District); or what points of law decided are in conflict with decisions of this Court; or wherein the action of said court violated the United States Constitution, except in a general way said petition does allege that the decision of the Circuit Court of Appeals violates the 14th Amendment to the Constitution and "permits the Respondents to take or destroy valuable property rights without compensation" and "in violation of the commerce clause of the Constitution" (Pet. 6-7). See *Sutter* v. *Middland Railway Company*, 280 U. S. 521; *Davis* v. *Currie*, 266 U. S. 182.

We also direct the Court to the fact that said petition does not adequately and fairly disclose the question of law involved and the grounds on which the Circuit Court rested its decision, but on the contrary misstates the holding of said Court as is shown by comparisons of quotations from said petition with quotations from the Court's opinion as follows:

QUOTATION FROM PETITION

"The Texas Legislature passed in 1931 what we commonly refer to as the 'Motor Carrier Truck Law' (Acts 1931, 42nd Leg., p. 480, Ch. 277; Art. 911b, Vernon's Annotated Civil Statutes of Texas, 1925) making no distinction in its application to intra and interstate commerce. The only applicable provision of the Texas Act requiring a 'certificate of convenience and necessity,' in part, follows:

"'Section 3. No motor carrier shall, after this Act goes into effect, operate as a common carrier without first having obtained from the Commission, under the provisions of this Act, a certificate of convenience and necessity pursuant to a finding to the effect that the public convenience and necessity require such operation,' etc.

"This is the certificate which respondents say petitioner must have and which petitioner does not even claim to have.

"Petitioner says he never did have to have any such certificate but that if he did that then the Federal Motor Carrier Act, 1935, superseded that part of the Texas Act requiring certificates or permits to operate exclusively in interstate commerce" (Pet. 2).

COURT'S OPINION QUOTATION

"Respondents further averred in their answer that should complainant present to the Commission an application to transport property for hire in interstate commerce over the highways of Texas, the said Commission would hear said application; that in hearing the application the Commission would require the applicant to show by facts that the highways proposed to be used by him were capable of withstanding the proposed use without undue injury and damage to them and without unreasonable interference with their use by the general public for ordinary purposes. The respondents specifically averred that the Commission would not require the applicant to prove that public convenience and ne-

cessity require the proposed service, nor would it consider the adequacy of the existing transportation facilities or the effect the proposed operation would have on the existing transportation facilities in determining whether or not it would authorize said applicant to operate over said highways" (R. 165).

"The authorities of appellee above cited are not controlling. Vernon's Ann. Civ. St. Tex., Article 911 (b) Sec. 6 (fol. 170) sets out the things which an applicant for a permit must show before it will be granted. Sections 6 and 9 of Article 911 (b) designate what the Commission shall consider in granting or refusing permits and certificates and these are further enlarged by Section 4 (d), which specifically makes it the duty of the Commission to regulate and supervise motor carriers in all matters whether therein specifically mentioned or not, so as, carefully, to preserve transportation and relieve undue burden on the highways arising by reason of the use of the highways by motor carriers, adjusting and administering its regulations in the interest of the public" (R. 167).

Petitioner makes an incorrect statement as to the evidence introduced in the trial court by Respondents (Pet. 4) and a correct statement as to the evidence offered by Respondents is shown in our "Statement of the Case" herein, Page 5.

It shall be Respondents' purpose in this brief to merely announce the holding of the Circuit Court of Appeals and then by argument show that it is not subject to any of the grounds relied on by Petitioner in his petition for the granting of the Writ.

HOLDING OF CIRCUIT COURT OF APPEALS

The Court properly held that the Federal Motor Carrier Act of 1935 did not supersede the Texas Motor Carrier Laws (Art. 911 (b) Vernon's Ann. Civ. St. of Tex.) in so far as said Texas Motor Carrier Laws delegate to the Railroad Commission of Texas authority and power to prohibit petitioner from using the said highways of said State as a common carrier engaged in transportation of property for hire by motor vehicles exclusively in interstate commerce until petitioner has complied with said State Motor Carrier Laws by filing application for such authority with the Railroad Commission of Texas and by making proof to said Commission that the structure of the highways proposed to be used by Petitioner was such that their proper preservation would not be impaired by the use sought by Petitioner and that the safety of the public upon said highways over which Petitioner sought his route would not be unreasonably endangered and that the additional use which he expected to impose upon said highways would not so congest traffic as to render them unsafe for the traveling public.

ARGUMENT

The Texas Motor Carrier Law, prior to the enactment of the Federal Motor Carrier Act of 1935, had been construed by this Court and inferior courts as vesting in the Railroad Commission of Texas power and authority to regulate and restrict operations

of all motor carriers for hire over the highways of the State of Texas regardless of whether or not said carriers were engaged in interstate or intrastate commerce, and specific authority from such Commission was required before any carrier operating in interstate commerce could become engaged in such interstate motor carrier transportation business over such highways. See:

Sage v. Baldwin, 55 Fed. (2d) 968;

Texport Carriers Corporation v. Smith, 8 Fed. Supp. 28;

Wald Storage and Transfer Co. v. Smith, 4 Fed. Sup. 61;

Galveston Truck Line Corp. v. Allen, 2 Fed. Sup. 488 Affirmed 289 U. S. 708;

Stephenson v. Binford, 53 Fed. (2d) 509, Affirmed 287 U. S. 251;

Sproles v. Binford, 286 U. S. 274.

After the enactment of the Federal Motor Carrier Act of 1935, it was mentioned for the first time by the Courts of this State in the case of *Railroad Commission of Texas, et al,* v. *Southwestern Greyhound Line,* 92 S. W. (2d) 296. This case was decided by the Court of Civil Appeals of the Third Supreme Judicial District of Texas and was appealed to the Supreme Court of Texas, and that Court's opinion is found in 99 S. W. (2d) 263.

It is this last mentioned opinion by the Supreme Court that petitioner contends that the opinion of the Circuit Court of Appeals is contrary to, however,

a comparison of this opinion by the Supreme Court of Texas and the opinion of the United States Circuit Court of Appeals will be convincing that the holdings of these courts are not in conflict with each other. It will be noted from a reading of the opinion by the Supreme Court of Texas, above mentioned, that that Court merely announced abstract propositions of law without attempting to apply such propositions to any given field of legislation whatsoever. The Supreme Court of Texas said in its opinion the following:

> "Such construction of the law does not deprive the State from protecting its highways and the public safety by reasonable and uniform regulations and exacting reasonable compensation for the use of such highways." (99 S. W. (2d) 268)
>
> "That the Federal Motor Carrier Law does not displace entirely the State law upon this subject is too plain for argument." (99 S. W. (2d) 268)
>
> "It will be noted that the cause was not tried on its merits nor is the suit intended to interfere with the jurisdiction of the Interstate Commerce Commission in carrying out any of the provisions of the Federal Motor Carrier Act." (99 S. W. (2d) 269)

The Circuit Court of Appeals, in its opinion, said:

> "The Interstate Commerce Commission has jurisdiction over the commercial consideration appertaining to the interstate truck business, *but the preservation and safety of the roads themselves have been left with the State Com-*

mission. It is well settled that if Congress provides only a limited field, then the State regulation is not prohibited" (R-168).

We submit that a careful examination of these decisions by the Supreme Court of Texas and the Circuit Court of Appeals will be convincing that petitioner is in error in his assertion that said opinions are in conflict. A discussion of the opinion by the Court of Civil Appeals in the *Southwestern Greyhound Line* v. *Railroad Commission, supra,* will not here be indulged because we take the position that such opinion conflicts with neither the opinions of the Supreme Court, cited above, or the Circuit Court of Appeals, and whatever the case may be, the State Supreme Court ruling would be controlling as to whether or not the Circuit Court of Appeals had decided a question of local law contrary to state law.

It will be noted that the decision of the Supreme Court of Texas in the *Southwestern Greyhound Line* v. *Railroad Commission,* 99 S. W. (2d) 263, merely decided that the decision of the trial Court in granting or refusing a temporary injunction will not be disturbed on appeal in the absence of a showing that the trial Court had abused its discretionary powers and where the petition on its face showed a cause of action. (99 S. W. 269-270)

After the Supreme Court of Texas rendered its decision in the *Southwestern Greyhound Line* v. *Railroad Commission, supra,* other cases come before the Court of Civil Appeals of Texas as follows:

Railroad Commission of Texas v. A. E. Bates, 108 S. W. (2d) 286;

Railroad Commission v. Futch, 108 S. W. (2d) 289;

Railroad Commission v. Peterson, 108 S. W. (2d) 289;

Railroad Commission of Texas v. Williams, 108 S. W. (2d) 290;

Railroad Commission v. Rayburn, 109 S. W. (2d) 708.

All of these cases were passed upon by the Court of Civil Appeals of the Third Supreme Judicial District of Texas, except the Rayburn case, which was rendered by the Court of Civil Appeals, Waco Division of Texas. An examination of each of these cases, and particularly the Bates' case, shows that the Courts of Civil Appeals of the State of Texas misconstrued the decision of the Supreme Court of Texas in the *Southwestern Greyhound Line* v. *Railroad Commission*, *supra*, and construed said opinion as holding that the Federal Motor Carrier Law of 1935 had entirely superseded the State Motor Carrier Laws to the extent that the Railroad Commission of Texas was divested of power to require interstate carriers offering to operate under grandfather rights of the Federal Act to secure authority to operate over the highways of the State of Texas. A statement showing why the Courts of Civil Appeals of Texas had so construed the Texas Supreme Court decision is shown by quotation from the Bates' case as follows:

"The contention of appellants seems to be that notwithstanding the enactment of the Federal Motor Carrier Act of 1935, which vested in the Interstate Commerce Commission exclusive authority to pass on the application of motor carriers engaged exclusively in interstate commerce on public highways for certificates of convenience and necessity, the Railroad Commission of Texas still has jurisdiction and authority, and it is its duty under the applicable provisions of article 911b, Vernon's Texas Statutes, to require motor common carriers, engaged in carrying interstate merchandise exclusively, to apply for and obtain certificates of convenience and necessity from the State Commission; and that the State Commission still has the authority to deny such certificates or permits if necessary for the protection of the State's highways, or for the safety of the public in the use of them. This question was necessarily decided against the contention of appellants by the Supreme Court in the case of Southwestern Greyhound Lines v. *Railroad Commission, 99 S. W. (2d) 263, 268, 109 A.L.R. 1235, wherein the court construed the Federal Motor Carrier Act of 1935, and held as follows: . . ."* (108 S. W. (2d) 287)

Petitioner cites a number of cases in his petition as being in conflict with prior holdings of this court, however, as he does not point out wherein such decisions conflict with the decisions of this Court, we shall not at this time endeavor to take up each of these cases as we are not advised as to his position as to wherein said decisions are in conflict with the decisions of this Court. We here assert that the opinion of the Circuit Court of Appeals is in harmony with a recent decision by this Court in the case

of *South Carolina State Highway Department* v. *Barnwell Brothers*, 58 Sup. Ct. Rep. 510, wherein this Court in speaking of the Federal Motor Carrier Act of 1935 had the following to say:

> "But the present case affords no occasion for saying that the bare possession of power by Congress to regulate the interstate traffic forces the states to conform to standards which Congress might, but has not adopted, or curtails their power to take measures to insure the safety and conservation of their highways which may be applied to like traffic moving intrastate. Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulation of which is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned, and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse." (58 S. Ct. 514-515)

Another recent opinion by this Court is the case of *Kelly* v. *State of Washington*, 58 S. Ct. 87, 302 U. S. 1, wherein this court in speaking of the power of the State of Washington to enforce certain inspection laws notwithstanding Federal legislation on certain phases closely related to the field in which

the State law was applicable, and in this case this Court had the following to say: (The court was speaking concerning the opinion of the Supreme Court of Washington):

> "The state court took the view that Congress had occupied the field and that no room was left for state action in relation to vessels plying on navigable waters within the control of the federal government.
>
> "There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together' . . . " (58 S. Ct. 91, 92)

Petitioner as one of the grounds for issuance of the writ stated in his petition says that the opinion of the Circuit Court of Appeals conflicts with the opinions of the Florida Supreme Court in the cases of *State ex rel R. C. Motor Lines* v. *Florida Railroad Commission*, 166 So. 840, and *State ex rel L & L Freight Lines* v. *Douglas et al*, 169 So. 389. On close examination of these cases, it is apparent that there is no conflict as such cases merely say that the power of the State to require interstate operators to secure a certificate of convenience and necessity is

vested in the interstate commerce commission under the Federal Motor Carrier Act. This is not the question in the case here before this court as the Railroad Commission of Texas under the adjudicated cases cited above (*Sage* v. *Baldwin*, and *Galveston Truck Line Corporation* v. *Allen*, *supra*), and evidence in this case was not objecting to McDonald's operations on the ground that he had not procured a certificate of public necessity and convenience but on the ground that highway conditions and traffic thereon would not permit such operations, and that he had not made application to said Commission showing that highway conditions and traffic thereon would permit such transportation and that the Commission on such showing had granted him authority to operate over such highways. The last paragraph in the Supreme Court's decision in the case of *State ex rel R. C. Motor Lines* v. *Florida Railroad Commission*, *supra*, shows that the principles announced by the Circuit Court of Appeals were recognized by the Florida Supreme Court, and this paragraph is copied here as follows:

> "Whatever right the Railroad Commission of the State of Florida may have vested in it under chapter 14764, Acts 1931, to specially determine, after hearing, that a particular route being used for an interstate motor carrier operation is so congested that another route not so congested should be designated and used as an alternative, its exercise is in its essence the application of the state's police power, and goes solely to the state's authority to route the traffic moving in commerce generally after the proper certificate therefore has been granted as a mat-

ter of course to the holder to engage in the motor carrier business of which the traffic itself is merely a part. The power cannot be so exercised by the state commission as to become an instrument for burdening or controlling the holder's right to engage in the business of carrying on interstate commerce as a lawful business, because the right to do that is a federal constitutional privilege with which the state has only a limited power to interfere in proper cases. See *Bradley* v. *Public Utilities Commission*, 289 U. S. 92, 53 S. Ct., 577, 77 L. Ed. 1053, 85 A.L. R. 1131." (166 So. 842)

The holding of the Circuit Court of Appeals in the case at bar does not defeat the commerce clause in the Constitution of the United States as asserted by petitioner in his petition. See *Bradley* v. *Public Utilities Commission*, 289 U. S. 92, 85 A.L.R. 1131, and cases there cited.

The decision of the Circuit Court of Appeals does not violate the Fourteenth Amendment to the Constitution of the United States as alleged in the petition. See *Bradley* v. *Public Utilities Commission*, *supra*, *Continental Baking Co.* v. *Woodring*, *286* U. S. 352, 81 A.L.R. 1402, *Stephenson* v. *Binford*, 287 U. S. 251, 87 A.L.R. 721.

Petitioner in his brief merely refers this court to a portion of the Texas Motor Carrier Laws as enacted by the 42nd Legislature of the State of Texas in 1931, as shown by Appendix A in his brief. We believe that a proper determination of this suit necessarily invites an examination of the entire Act as

is now fully set out in Article 911b, Vernon's Annotated Civil Statutes of Texas, and especially sections 4d and 22b thereof as shown in Appendix "A" attached hereto.

WHEREFORE, Respondents pray that the writ be in all things denied.

Respectfully submitted,

WILLIAM MCCRAW,
Attorney General of Texas
ALBERT G. WALKER,
Assistant Attorney General
Attorneys for Respondents.

APPENDIX A

Part of Texas Motor Carrier Laws (Art. 911B Vernon's Ann. Civil Statutes of Texas, being chapter 277, Acts of 1931, 42nd Legislature) as follows:

Section 4 (d) The Commission is further authorized and empowered, and it shall be its duty, to supervise and regulate motor carriers in all matters whether specifically mentioned herein or not so as to carefully preserve, foster and regulate transportation and to relieve the existing and all future undue burdens on the highways arising by reason of the use of the highways by motor carriers, adjusting and administering its regulations in the interests of the public.

The Commission, in prescribing and adopting rules and regulations and in forming its conclusions and in prescribing its orders, shall invite the Highway Commission's opinion on the condition of the public highways involved and the ability of said highways to carry the existing and proposed additional traffic, and the Commission shall give due and proper consideration to the orders, regulations, ordinances or recommendations of the Highway Commission of Texas; provided, however, nothing herein contained shall be deemed to restrict the powers of the Highway Commission under existing laws. The Commission shall also give due and proper consideration to the recommendations of the commissioners courts of the several counties and to the rec-

ommendations of the local government of any municipality through or between which motor carriers operate.

Section 22 (b) Declaration of Policy.—The business of operating as a motor carrier of property for hire along the highways of this State is declared to be a business affected with the public interest. The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks are not effectively regulated, have increased the dangers and hazards on public highways and make it imperative that more stringent regulations should be employed, to the end that the highways may be rendered safer for the use of the general public; that the wear of such highways may be reduced; that discrimination in rates charged may be eliminated; that congestion of traffic on the highways may be minimized; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the necessity of the general public, and that the various transportation agencies of the State may be adjusted and correlated so that public highways may serve the best interest of the general public.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 55

A. E. McDONALD,

Petitioner

vs.

ERNEST O. THOMPSON, ET AL,

Respondents

BRIEF OF RESPONDENTS

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FIRM FOUNDATION - AUSTIN, TEXAS

Corrections, A. E. McDonald vs. Ernest O. Thomp
et al, No. 55

Case of Barnwell Bros. v. South Caroline Highway Dept., 17 Fed. Supp. 803 should read "reve 58 Sup. Ct. 510"instead of "affirmed" as shown in the Index.

On page 2, Subdivision B, "Contentions of Respondents in Trial Court" should read "Co tentions of Petitioner in Trial Court"; sam correction in Index.

On page 3, the word "not" on line 22 (counting from the top down) should be "now".

On page 14 in citation Texport Carriers Corporat strike out "Aff. 54 Sup. Ct. 129".

On page 13 after the word "consent" in line 4 (co ing from bottom of page up) insert words as foll "as to interstate carriers".

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 55

A. E. McDONALD,

Petitioner

vs.

ERNEST O. THOMPSON, ET AL,

Respondents

BRIEF OF RESPONDENTS

INTRODUCTORY STATEMENT

Counsel for Petitioner have advised that they are relying upon brief as filed in support of the Petition for the Writ of Certiorari; however Respondents desire to file this brief in lieu of brief heretofore filed in opposition to the Petition for Writ of Certiorari, and herewith request that this brief be so filed and

considered.

STATEMENT OF THE CASE

A. How Case Reached this Court

This case reached the United States Circuit Court of Appeals by an appeal by E. O. Thompson, C. V. Terrell and Lon A. Smith, constituting the Railroad Commission of Texas, and Walton D. Hood, W. B. Renfro and Tom Miller, employees of The Railroad Commission of Texas, from a final decree (R-42-45) of the District Court of the United States for the Northern District of Texas, restraining the Respondents individually and in their official capacities, and their agents, servants, representatives and employees, from causing either directly or indirectly, in any way the molestation, arrest or interference with the drivers of Petitioner's trucks, and from in any way impeding, or interfering with Petitioner's business in the transportation of property in interstate commerce in any manner whatsoever. On April 12, 1938 the Circuit Court of Civil Appeals reversed the judgment and remanded with instructions to dismiss the bill. See *Thompson et al* v. *McDonald*, 95 Fed. (2d) 937 (R-159-170), and thereafter Petitioner filed his Petition for Writ of Certiorari in this Court, which was granted October 10, 1938.

B. Contentions of Respondents in Trial Court

Petitioner in his Bill of Complaint alleged that

he had been regularly operating in interstate commerce by motor vehicle for hire for many years prior to June 1, 1935, and at all times since that date and was prior to said date, and is now, engaged in the business of transporting property by motor vehicles through and between the States of Texas and Oklahoma, and between intervening points situated in different states; that in engaging in such transportation he had used within the State of Texas Federal Highways Nos. 75, 77, 80, 81, 290, 90 and 281, which are federal aided highways; that by an Act of Congress, known as the Motor Carrier Act of 1935, the sole and exclusive power, jurisdiction and authority to regulate transportation in interstate commerce had been vested in the Interstate Commerce Commission; that under the provisions of said Act he had applied to the Interstate Commerce Commission for a certificate of public convenience and necessity, and would be entitled to receive such certificate as a matter of right under what is known as the Grandfather Clause; that the jurisdiction over, and regulation and control of his business was not exclusively in the Interstate Commerce Commission; that by reason of his application for permit under the Grandfather Clause he was entitled to continue in the transportation of property as a common carrier without a certificate or permit until such time as the Interstate Commerce Commission may act upon his application; that the Railroad Commission of Texas refused to issue to him license tags or numbers that are required to be affixed by all motor vehicles carrying property in the transportation business as common carriers in the State of Texas, and

have issued orders and instructions to arrest all drivers and stop all trucks of Petitioner, because Petitioner had no permit from the Railroad Commission of Texas to operate; that he had been engaged exclusively in the transportation of property in Interstate Commerce for a long time prior to June 1, 1935, and had built up a lucrative transportation business; that his drivers had been arrested by the employees of the Railroad Commission of Texas and his business had been hindered and interfered with by said Commission, and its agents, servants, and representatives (R-1 to 18).

C. Decrees of Trial Court

The Judge of the United States District Court, for the Northern District of Texas, Fort Worth Division, on the sworn Bill of Complaint of Petitioner filed January 17, 1936, on that date issued a temporary restraining order citing Respondents to appear on the 24th day of January, 1936 to show cause why a temporary injunction should not be granted. (R. 17, 18, 19). On the 13th day of October, 1936, on motion made the trial Court amended its decree so as to recite that Respondents Motion to Dismiss had been overruled and proper exception taken, and that all proofs offered in evidence of January 25, on hearing of preliminary injunction would be considered as in evidence on trial on the merits, at which time the respective parties offered their additional proofs, upon which the court based its judgment. (R. 42).

D. Answer and Evidence of Respondents

On the 24th day of January, 1936, the Respondents filed a Motion to Dismiss the Bill of Complaint (R. 19-22), and on the 30th day of April, 1936, filed their First Amended Answer. (R. 22-32).

The Respondents offered in evidence their First Amended Answer and attached Exhibits "A" to "(j)", verified by Tilden L. Childs, (R. 22-33) (R. 152), said Exhibits being a part of said Answer, which Exhibits it was agreed should be forwarded to this Court as a part of the Record, (R. 138) and which are on file in this Court, which Exhibits have been printed in this Court as supplement to the record. From this affidavit of Tilden L. Childs, and the Exhibits attached thereto as a part thereof, the following facts appear, as set out in Respondents' Amended Answer, introduced in evidence:

1. That in 1934 Petitioner secured from the Railroad Commission of Texas his Special Commodity Carrier Permit to haul only livestock distributed by the Agricultural Department of the State of Texas between Texas points, which said Special Commodity Permit was on October 25, 1934 cancelled by the Railroad Commission of Texas. (R. 26), and (Respondents Original Exhibits "A" & "B".)

2. That in May, 1934, Petitioner filed an application with the Railroad Commission of Texas for a certificate as a common carrier in interstate commerce. A hearing was had upon said application,

testimony heard, and Order entered July 14, 1934, denying same. (R. 26-27) and (Respondents Original Exhibits "C", "D" & "E".)

3. That thereafter Petitioner filed in the District Court of Travis County an appeal from said Order denying his application and secured an injunction against the Commission from interfering with his operations, from which judgment the Respondents appealed to the Court of Civil Appeals, 3rd Judicial District, which said Court reversed the judgment of the trial court and dissolved the injunction and at the time of the final hearing of this cause the time for filing a Motion for Rehearing had expired, and the judgment of the Court of Civil Appeals dissolving the injunction became final. The opinion of the Court of Civil Appeals dissolving this injunction is reported in 90 S. W. (2d) 581. (R. 27 and Respondents Original Exhibits "F", "G", "H" & "I").

4. While said appeal was pending in the Court of Civil Appeals Petitioner filed with the Railroad Commission of Texas another application for a common carrier certificate to engage in intrastate commerce. (R. 28 and Respondents original Exhibit "J").

5. Petitioner was never authorized to use the highways of Texas by permit or certificate or otherwise from the Railroad Commission of Texas, except the Special Commodity Permit granted March 30, 1934 and cancelled October 15, 1934. (R. 29-30).

6. The Order of the Railroad Commission of Texas denying the application of Petitioner for a certificate as a common carrier in interstate commerce made specific *findings of fact upon which the denial was based as to the use of the highways generally by trucks, and denied such permit on the ground that the use of the highways would place an undue burden upon the physical properties of the highways themselves, and would endanger public safety and would interfere with the use thereof by the public.* (R. 29-30 and respondents original Exhibit "E").

7. That Petitioner's operations have not been under any certificate or permit granted by the Railroad Commission of Texas but under the protection of an injunction issued by the District Court of Travis County and dissolved by the Court of Civil Appeals as shown above, and he has never operated under any permit or authority of the Railroad Commission of Texas, except the Special Commodity Permit which was cancelled October 15, 1934. (R-28).

8. That should Petitioner file his application to use the highways in his alleged exclusive interstate transportation business, the Railroad Commission of Texas would only require him to prove highways were capable of withstanding such transportation business and that traffic thereon would permit; and would not require him to show convenience and necessity or consider adequacy of existing transportation facilities or the effect such proposed operation would have on existing transportation facilities and

upon showing that the "highways proposed to be used by him are capable of withstanding proposed use without undue injury and damage to said highways and without unreasonable interference with the use of said highways by the general public for ordinary purposes", it would authorize him to operate over such highways. (R-32). Respondents offered other evidence as shown in record. (R. 152-154).

E. Trial Court's Finding of Facts and Conclusions of Law

The trial Court found as facts in the case that the Respondent had caused the arrest of Petitioner's truck drivers and had delayed and tied up Petitioner's trucks and have filed criminal complaints against Petitioner's drivers and threatened and will continue to interfere with and put a stop to Petitioner's operations; (R-35) that for a long time prior to June 1, 1935, and at all times since Petitioner has been continuously in bona fide operation engaged in the business of transporting property for hire over the highways of Texas and Oklahoma exclusively in interstate commerce; (R-35), that in such transportation he uses highways designated as federal highways, Nos. 75, 77, 80, 81, 290, 90 and 281; that all of the highways used by Petitioner are federal aided highways except a portion of No. 281; (R-35-36) that Petitioner had filed his application with the Interstate Commerce Commission for a certificate and had filed his tariffs and rates with the Interstate Commerce Commission, and had on file

with the Railroad Commission of Texas public liability and property damage insurance; (R-36), that he did not transport property in intrastate commerce (R-36), that all of his trucks had been registered in the State of Texas and are in good mechanical repair. The trial Court concluded as a matter of law that the Motor Carrier Act of 1935 superseded the Texas Motor Truck laws, insofar as said Texas laws give to the Railroad Commission of Texas power to forbid the use of federal highways by Petitioner's trucks when engaged exclusively in the transportation of property in interstate commerce. (R. 37-38). It further concluded that the definition of bona fide operator in the Motor Carrier Act relates to the actual, physical, continuous and regular operation of such carrier, and further concluded, as a matter of law, that Petitioner was in bona fide operation on and prior to June 1, 1935, and has been continuously in such operation since said date, and that Petitioner has complied with all applicable police requirements of the State of Texas. (R. 37-38).

F. Holding of Circuit Court of Appeals

The Court held that the Federal Motor Carrier Act of 1935 did not supersede the Texas Motor Carrier Laws (Art. 911 (b) Vernon's Ann. Civ. St. of Tex.) in so far as said Texas Motor Carrier Laws delegate to the Railroad Commission of Texas authority and power to prohibit peti-

tioner from using the said highways of said State as a common carrier engaged in transportation of property for hire by motor vehicles exclusively in interstate commerce until petitioner has complied with said State Motor Carrier Laws by filing application for such authority with the Railroad Commission of Texas and by making proof to said Commission that the structure of the highways proposed to be used by Petitioner was such that their proper preservation would not be impaired by the use sought by Petitioner and that the safety of the public upon said highways over which Petitioner sought his route would not be unreasonably endangered and that the additional use which he expected to impose upon said highways would not so congest traffic as to render them unsafe for the traveling public. (R. 159-173).

STATUTES INVOLVED

Federal Motor Carrier Act of 1935, Ch. 8, Title 49 USCA.

Article 911B Vernon Ann. Civil Statutes of Texas.

Article 1690 (B) Vernon Ann. Penal Code of Tex-

as.

A portion of the Texas Statutes are printed in appendix. These Texas statutes are herein referred to as the Texas Motor Carrier Laws applicable to subject matter of this suit.

SUMMARY OF POINTS INVOLVED

POINT I.

The Federal Motor Carrier Act does not supersede or conflict with the Texas Motor Carrier Laws insofar as the State laws authorize its Railroad Commission to deny both interstate and intrastate motor carriers for hire the use of the highways, when to grant such use the proper preservation of such highways would be impaired or the traffic on such highways would be so congested as to render them unsafe for the traveling public, including both intrastate and interstate carriers for hire theretofore issued permits to use such highway. See *Commonwealth* v. *Kennedy*, 195 Atlantic 770; *South Carolina State Highway Department* v. *Barnwell Bros.*, 58 S. Ct. 510.

The provisions found in Sections 308(a) and 309(b) of the Federal Motor Carrier Act clearly show that the Interstate Commerce Commission was given no authority to limit the use of

such highway after a permit was granted, thus clearly indicating that as to the exercise of such matters the Congress was content to leave the same with the various states.

Section 307(b) says:

> "No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways."

Clearly Congress did not by such Act grant away the State's proprietary or property rights in the use of the highways, as it is recognized that the State owns the highways and is charged with the duty of maintaining them. See Morris v. Duby, 24 U. S. 135, 47 S. Ct. 548, State v. Limestone Co., 114 Tex. 345.

Section 304 of the Act states the powers and duties of the Interstate Commerce Commission is conclusive that the Congress neither by direct or implied legislation intended to legislate as to the matter of highway conservation and regulation of traffic thereon. See: Salvage v. Jones, 53 Law Ed. 1182, 225 U. S. 501, at page 533, and cases cited in main argument and this point.

POINT II.

Prior to the enactment of the Federal Motor Carrier Act, the Federal Courts had uniformly held that the State Railroad Commission had the authority to refuse an application for an interstate permit for motor

transportation for hire, if the conditions of the highway over which such transportation was to be conducted was such that the permit or authority to so use them should be denied, if necessary, for the protection of the highways from inordinate and unsafe uses, and the protection and safety of those having the primary right to use such highways. *Sage* v. *Baldwin*, 55 Fed. (2d) 968; *Texport Carrier Corporation* v. *Smith*, 8 Fed. Supp. 28; *Wald Storage and Transfer Co.* v. *Smith*, 4 Fed. Supp. 61 aff. 54 Sup. Ct. 129; *Galveston Truck Line Corporation* v. *Allen*, 2 Fed. Supp. 488; *Stephenson* v. *Binford*, 50 Fed. (2d) 509 aff. 54 Sup. Ct. 227; *C. A. Bradley* v. *Public Utility Commission of Ohio*, 53 S. Ct. 577.

POINT III.

Prior to and at the time the Federal Motor Carrier Act was passed, it was settled law that the Texas Motor Carrier statutes prohibited the intrastate as well as the interstate motor transportation of property for hire over its highways by any carrier except on securing from the State Railroad Commission its consent authorizing such transportation. and such consent was grantable without further consideration upon showing that the highway and the traffic hereon would permit such additional transportation.

See Article 911B, Section 3, Vernon's Annotated Civil Statutes of Texas; *Railroad Commission* v. *Southwestern Greyhound Lines*, 92 S. W. (2d) 296; *Texport Carriers Corporation* v. *Smith*, 8 Fed. Supp. 28 aff. 54 Sup. Ct. 129; *Wald Storage and Transfer Co.* v. *Smith, supra; Beard* v. *Smith*, 4 Fed. Supp. 61, affirmed 290 U. S. 596; *Sage V. Baldwin*, 55 Fed. (2d) 968; *Stephenson* v. *Binford*, 287 U. S. 251, and *Sproles* v. *Binford*, 286 U. S. 274.

POINT IV.

Obviously, unless state laws as they have been applied have been superseded, no common carrier or contract carrier as defined in the Federal Motor Carrier Act could successfully claim "Grandfather Rights" as to Texas Highways under Section 306 and Section 309 of the Act, unless on June 1, 1935 if common carrier, or on July 1, 1935, if contract carrier, it was operating under authority of the Railroad Commission of Texas, duly issued under the laws of such State, because any operation otherwise would not be bona fide as required by the Federal Motor Carrier Act, but would be unlawful.

McDonald's operations on and prior to June, 1935, as alleged by him, might have been bona fide insofar as the highways of the State of Oklahoma were con-

cerned, but within the bounds of the State of Texas they were clearly unlawful, and the filing of application for a certificate under his claim for "Grandfather Rights" would confer no right to continue his unlawful operations over the highways of Texas, pending a determination of such application. See *Town-of-Conway* v. *Atlantic Coast Line R. Co.* 20 Fed. (2) 250, at par. 11 on page 259, and other cases cited under argument, point IV.

POINT V.

The extent to which the Texas Motor Carrier Statutes were construed to be applicable to interstate transportation property for hire by motor vehicles prior to the Federal Motor Carrier Act is sustained by the courts as a necessary exercise of the State's police power, and if the Congress has constitutional authority to supersede such laws as construed and applied, then such state statutes should not be held to be superseded by Federal act unless they conflict in such a way that the two acts cannot be "reconciled or consistently stand together." See cases cited under argument of points V and VI.

POINT VI.

The Texas Motor Carrier Statutes as here-

tofore held applicable to interstate transportation property for hire by motor carriers are not regulations of interstate commerce or directed against such commerce, but are recognized police powers reserved to the State to regulate the rights of the State and the public as to the use of its highways and preservation thereof, and promotion of safety thereon, and since such State regulations are equally applicable to interstate as well as to intrastate carriers without discrimination, and they do not conflict with any expressed or assumed will of Congress expressed or necessarily implied in the Federal Act, they must be sustained. See cases cited under argument of points V and VI.

POINT VII.

Congress, at the time the Federal Motor Carrier Act was passed, no doubt was familiar with the decisions of this court recognizing the State's police power over its highways as to preservation thereof and promotion of safety through regulations of traffic thereon applicable to interstate as well as to intrastate motor carriers for hire alike without discrimination, and its failure to legislate expressly on the subjects of highway

conservation and traffic thereon, its Act must be construed as leaving such powers within the State to be exercised by that authority only, to be disturbed when the State acts in such a manner as to constitute an undue burden on interstate commerce. Cases cited under argument on point VII.

POINT VIII.

Since the Federal Act is not in conflict with the applicability of the Texas Motor Carrier Act as to the State's police power to conserve and protect its highways and to promote safety by regulation of traffic thereon under statutes and orders of the Railroad Commission applicable to interstate as well as intrastate carriers, and recognized by the decisions of this court at the time of its enactment, the use of the words, "bona fide operations" in Sections 306 and 309 of the Federal Act must be given a meaning consistent with the general purposes of the Act. See cases cited under argument on points IV and VIII.

ARGUMENT

POINT I.

Does the Federal Motor Carrier Act super-

sede the Texas Motor Carrier Laws (Art 911B, Vernon's Annotated Civil Statutes of Texas) so far as the State statutes apply to interstate carriers as to conservation and protection of the state highways and traffic condition thereon?

This suit was instituted and prosecuted by Petitioner by basing his cause of action on the ground that the Federal Act had in fact superseded the state motor carrier statutes. A determination of this question necessarily involves a consideration of the two acts. In our argument under Points II and III it is shown that the State statutes were applicable to interstate carriers prior to and at the time the Federal Act was passed and here we will only consider the Federal Act, its provisions and court decisions relating to its application. The declaration of policy as set out in Sec. 302(b) of the Federal Act shows that the provisions of the Act are to be applicable only to interstate carriers, since any regulation as to highway conservation and traffic conditions thereon must necessarily regulate interstate as well as intrastate carriers as to highway use and traffic conditions thereon; and Congress by so limiting its declaration of policy has shown an intent not to assume any control over the subject matter of highway conservation or regulation of traffic thereon to promote safety by preventing such highways from becoming unduly congested by the operation of commercial carriers thereon. That such was the intent of Congress is clearly shown by a

proviso inserted in Sec. 308 and 309 of the act reading as follows:

> "Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

These provisos place a restriction upon the Interstate Commerce Commission that would prevent it from interfering with one of its certificate holders from increasing the number of trucks upon any highway covered by the permit even if such increase should be denied on the ground that the highways were too congested or the physical condition of such highways or parts thereof would not permit the increase in use without undue injury to them. This same provision would prevent the Interstate Commerce Commission in issuing a certificate originally from limiting the number of trucks the certificate holder could place upon the state's highways even if conditions above existed. Section 304 of the Act sets out the duties and powers of the Interstate Commerce Commission and the provision of this section clearly shows that the matters of highway conservation and promotion of safety thereon by preventing undue amount of commercial transportation is not a subject the commission is authorized to deal with.

It is well recognized that the State of Texas has a proprietary and property right in its highways and Congress clearly indicated its intent not to in-

terfere with the states' rights as to such interest in its highways by inserting in the Act the section as follows:

> "Certificate not to confer proprietary or property rights in the highway. No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways." (Section 307(b)

The Supreme Court of Texas in the case of *Robbins et al* v. *Limestone County et al*, 114 Tex. 345 has held that the highways of the state belong to the state, and in the case of *Morris* v. *Duby*, 274 U. S. 135, 47 Sup. Ct. 548, this court has recognized the state's proprietary or property rights in these highways including those built with Federal aid by language as follows:

> " * * * An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the state its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. * * * Conserving limitation is something that must rest with the road supervising authorities of the state, not only on the general constitutional distinction between national and state powers, but also for the additional reason having regard to the argument based on a contract that under the convention between the United States and the state in respect to these jointly aided roads, the maintenance after construction is primarily imposed on

the state. Regulation as to the method of use therefore necessarily remains with the state and cannot be interfered with unless the regulation is so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contribution to bettering the highway systems of the Union and to facilitating the carrying of the mails over them. There is no averment of the bill or any showing by affidavit making out such a case."

This court in the last mentioned case had under consideration the Federal Highway Act. Clearly Congress by inserting Sec. 307(b) in the Federal Motor Carrier Act expressly provided that the state's proprietary or property rights in the highways would not be impaired but remain subject to full exercise by the state within the limitations in quotation last above. This court also in the case of South Carolina *State Highway Department* v. *Barnwell Bros.*, 58 Sup. Ct. 510, at page 514-515 has more recently spoken upon this subject as to the extent of operations covered by the Federal Motor Carrier Act as follows:

"But the present case affords no occasion for saying that the bare possession of power by Congress to regulate the interstate traffic forces the states to conform to standards which Congress might, but has not adopted, or curtails their power to take measures to insure the safety and conservation of their highways which may be applied to like traffic moving intrastate. Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulation of which

is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned, and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse."

The Superior Court of Pennsylvania in the case of *Commonwealth* v. *Kennedy*, 195 Atlantic, at page 770 has construed the Federal Act as follows:

"* * * but a careful examination of the provisions of the Federal Motor Carrier Act 1935 discloses to us no intention on the part of Congress to interfere with the well-recognized authority of cities to regular motor vehicle traffic within their borders and designate which of their streets may or may not be used for transportation of passengers and property by motor vehicles for pay, provided such regulations and limitations do not discriminate against nor impose an undue burden on interstate commerce. As we read the act, Congress has not seen fit to commit the duty or authority to the Interstate Commerce Commission and it remains as it was before the passage of the act of 1935. The act of Congress of 1935 specifically provides that 'no certificate issued under this chapter shall confer any proprietary or property rights in the

use of the public highways' (part 2, Sec. 207(b), U. S. Code Title 49, Sec. 307(b), 49 U. S. C. A. Sec. 307(b).) * * * In the light of these provisions we are of opinion that the act of Congress of 1935 does not deny to the states the power to adopt reasonable regulations limiting the use of their highways by motor carriers engaged in operating vehicles in transportation of passensengers or property for pay in both interstate and intrastate commerce, where necessary for the preservation of the highways or the safety, health, and welfare of the public."

An examination of Senate Docket No. 152, of the 73rd Congress, Second Session, clearly discloses that the moving cause for enacting the Federal Motor Carrier Act was not to supersede the State Motor Carrier Laws as to the right of the State to control the traffic upon its highways with the end in view that congestion thereon would be properly regulated and such highways would be protected from undue injury. The above report or document is a general review of the Motor Carrier laws of the various states of the Union prior to the enactment of the Federal Motor Carrier Act, and it is clear from this document that the evils to abate, to which the Federal Motor Carrier Law was directed, were those evils arising in a particular field or jurisdiction over which it was conceded that the various states and their respective jurisdictions had no power to legislate and regulate effectively. It was also apparent from such document that prior to the enactment of the Federal Motor Carrier Act it was recognized that the states had the inherent police power to reg-

ulate the use of their highways and to foster and preserve the instrumentalities of Intrastate Commerce.

In support of these statements, we quote from said document, which is a report of the Federal Coordinator of Transportation on the Regulation of Transportation Agencies other than railroads and on proposed changes in the railroad regulations, dated February 28th, 1934, to-wit:

> "Thus, it has been established by these decisions that a State, pursuant to its right to control and condition the use of its highways in the public interest, may validly regulate intrastate contract and private carriers in all matters which appear essential to effective regulation. No reason is perceived why Congress may not validly impose similar regulation upon the large volume of interstate commerce that is transported by contract and private carriers. Certainly its powers under the commerce clause are no less potent and all-embracing in this particular field than are the police powers of the States to control the use of their highways and to foster and preserve the instrumentalities of intrastate commerce. * * *
>
> "The full enforcement of the powers which the States may legally exercise is, however, rendered difficult or impracticable in certain respects, owing in some instances to the nonresident status of the interstate carrier but, more generally, to the lack of complete regulatory authority. Accounts, records, and reports are an example of the latter situation.

"On the other hand, a State cannot restrain wasteful competition and unnecessary operations by withholding the issuance of certificate or permit (Buck v. Kuykendall, 267 U. S. 307; Bush and Sons Company v. Maloy, 267 U. S. 317; Sprout v. South Bend, 277 U. S. 163). It has no jurisdiction over the rates, probably cannot prescribe accounts, records, and reports except for tax purposes, and cannot require bonds or insurance for the benefit of passengers or cargo (Sage v. Baldwin, 55 F. (2d) 968; Johnson Transfer and Freight Lines v. Perry, 47 F. (2d) 900; Michigan Public Utilities Commission v. Duke, 266 U. S. 570; Coordination of Motor Transportation, 182 I. C. C. 263, 373). A State has no control over the capitalization or consolidation of or the issuance of securities by interstate carriers and only a limited jurisdiction to deal with complaints.

"The suggestion which some have made that regulation by the individual States, if broadened within constitutional limits and efficiently administered, would satisfy the need for Federal legislation is therefore an impracticable one."

No doubt this report or document sounds out the principal reasons for the enactment of the Federal Motor Carrier Act, and since said document clearly recognizes the powers of the states to legislate and regulate as to the use of its highways to preserve such highways and to the end that public safety will be promoted, it is not conceivable that the Congress did intend by implied legislation or otherwise, that its Act would supersede, displace, and set aside the complicated governmental machinery of the various

states that had been set up by such states for the purpose of carrying on and conducting this all-important police power of such states in the preservation and regulation of such state highways wholly in the jurisdiction of the respective states, and a power which is recognized by all authorities as being inherent in the respective states.

Nowhere in the Federal Motor Carrier Act is there found any standards by which the Interstate Commerce Commission may proceed to regulate traffic on such highways as to safety and preservation of such highways. And under the case of *Schechter Poultry Co.* v. *United States*, 295 U. S. 495, 97 A. L. R., 966, the courts could not, even where the Commission might attempt to set up governmental machinery for the purpose of regulating and controlling the use of the vrious highways of the states as to traffic congestion and preservation thereof, approve such action on the part of the Commission because the Federal Motor Carrier Act wholly fails to set forth any standards or recognizes any authority in said Commission to carry on such governmental functions.

ARGUMENT CONTINUED

POINT II.

Prior to the passage of the Federal Motor Carrier Act the United States Courts were uniform in their decisions that the State

Commission had the authority to refuse an application for an interstate permit if the condition of the highways was such that the permit should be denied if necessary for the protection of the highways from inordinate and unsafe uses and the protection and safety of those having the primary right to use them. The first decision was Sage v. Baldwin, by the U. S. Court for the Northern District of Texas, 55 Fed. Rep. (2) 968, in which the Court said:

> "Highways belong to the public and are primarily for its use in the ordinary way, and there may be valid prohibition of a use for gain in an extraordinary way. There may be regulation of and activity which is not purely a matter of right, but which is carried on by sufferance or permission. The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is harmful to the ways themselves."

In the case of *Texport Carrier Corporation* v. *Smith*, 8 Fed. Sup. 28, involving interstate commerce the Court followed this opinion and used the following language:

> "The State of Texas, by its Motor Carrier Act, Article 911b, par. 22b, Vernon's Ann. Civil St. Texas, has declared that the business of carry-

ing property for hire over the state's highways may not be conducted as a right, but only as a privilege, and in subordination of the necessities and interests of the general public for whose use the highways were primarily designed and laid down. It has enacted laws to bring this about, and has conferred upon the Railroad Commission as statutory agent, wide powers to control and regulate the business of carrying for hire so as to adapt it to traffic and traffic conditions, and make effective the legislative declaration of policy." * * *

"When the full, definite, and concrete findings of the Commission are considered in the light of these principles, it cannot be maintained that the evidence plaintiff has offered in support of its right to institute a new motor carrier service, using forty-eight to two hundred trucks over the most used highway, and between and through the most densely populated sections of the state, has overcome those findings by showing them to be arbitrary, capricious, and unreasonable. In the light of these principles and of the evidence offered in this case, it seems plain to us that the findings and order of the Commission stand."

In the case of *Wald Storage & Transfer Company* v. *Smith*, 4 Fed. Sup. 61, it was re-affirmed in the following language:

"Prior decisions of this court, (citing cases) * * * and the recent decision of the Supreme Court of the United States in line with all of these, C. A. Bradley v. Public Utilities Comm. of Ohio, 53 S. Ct. 577, 77 L. Ed. , decided

April 10, 1933, have established the full right of the state to control, by prohibition and permit to intrastate business and its right also to control the use of the public roads by persons desiring to use them for hire as to interstate business, by prohibition and permit, in the exercise of police power of the state to promote safety of life and limb, and the convenience of use of the highways for the purposes for which they were primarily designed, as well as for the preservation of the state's property in the roads and their protection against injury and destruction.

* * * * An examination of the statutes and the decisions in the light of the Sage Case, supra, will show that though the Legislature has in terms made no distinction between inter and intrastate business, the courts have worked out a construction of the statutes which finds valid and effective, as applied to interstate business, those provisions in it which have to do with the protection of the highways from inordinate and unsafe uses, and the protection of the safety of those having the primary right to use them, while striking down those provisions which authorize the commission to refuse permits for interstate operations based on purely or mainly competitive conditions, that is, considerations of the adequacy of existing transportation facilities, and the effect of the proposed operations on such facilities."

See also *Galveston Truck Line Corporation* v. *Allen*, 2 Fed. Sup. 488; *Stephenson* v. *Binford*, 50 Fed. (2) 509. These decisions of the United States Courts rendered prior to the passage of the Federal Motor Carrier law clearly and definitely established

the principle that the Railroad Commission of Texas had the authority to preserve the highways of the State from injury and destruction, and to protect the right of the public to the use thereof against congestion as to those who sought to engage in interstate transportation as well as those who sought to engage in intrastate transportation. It appears from this record that the Railroad Commission of Texas, in the exercise of this power decreed to be lodged in it by the Courts and based on the particular elements of power which the Courts decreed, it might exercise, that is, the preservation of the highways and the protection of the traveling public, denied Petitioner's application for a permit to engage in interstate commerce over the highways designated in his application. The state has appropriate Penal Statutes and Civil Statutes authorizing penalty and injunction to enforce its Motor Carrier Laws. See Article 1690B, Vernon's Ann. Penal Code of Texas.

ARGUMENT CONTINUED

POINT III.

On June 1, 1935, and for several years prior thereto, the laws of the State of Texas forbade and prohibited the interstate transportation of property for hire over its highways by motor carriers by any person except upon and after securing, and in accordance with a certificate from the Railroad Commission of Texas.

The Motor Truck Law of Texas, Article 911b, Section 3, Revised Statutes, 1925, as amended provides as follows:

> "Sec. 3. No motor carrier shall, after this Act goes into effect, operate as a common carrier without first having obtained from the Commission, under the provisions of this Act, a certificate of public convenience and necessity pursuant to a finding to the effect that the public convenience and necessity require such operation. No motor carrier shall, after this Act goes into effect, operate as a contract carrier without first having obtained from the Commission a permit so to do which permit shall not be issued until the applicant shall have in all things complied with the requirements of this Act."

Section 6a, of the same Article, provides as follows:

> "Sec. 6 (a). No motor carrier now operating as a contract carrier or that may hereafter desire to engage in the business of a contract carrier shall so operate until it shall have received a permit from the Commission to engage in such business and such permit shall not be issued until the applicant shall have in all things complied with the requirements of this Act; nor shall such permit be issued unless the character of business being done or to be done by the applicant strictly conforms with the definition of a contract carrier."

It is well settled that the Texas Motor Carrier Laws give the Railroad Commission of Texas jurisdiction and authority over the use of Texas high-

ways by carriers engaged in interstate commerce, and these laws prohibit any operations over the highways except those authorized by the Commission. As to interstate carriers, the Commission is authorized to deny any such certificate upon consideration of whether the structure and preservation of the highways will permit the use proposed or whether the safety of the public will authorize such use. In *Railroad Commission of Texas et al* v. *Southwestern Greyhound Lines, Inc.*, 92 S. W. (2d) 296, decided February 26, 1936, by the Court of Civil Appeals of Texas, this very point was considered, and the court reviewed the authorities, and said:

> "It appears, therefore, that the duty is imposed upon the commission, before acting upon an application, to determine three questions: First, whether such commerce is needed to serve the public convenience; second, whether the structure and preservation of the highways will permit such use; and, third, whether, admitting both of these, the safety of the public will authorize such use. As to the first of these questions, the Railroad Commission has jurisdiction only as to intrastate commerce, and not as to interstate commerce. As to the second and third questions, under the decisions above cited, the Railroad Commission has jurisdiction both as to interstate and intrastate operations so far as they affect the highways within the State."

This case was appealed to the Supreme Court of Texas, and that court, in an opinion handed down on November 25, 1936, reversed the judgment of the Court of Civil Appeals in holding that the temporary

injunction was improvidently issued and in dissolving it.

The Court in analyzing the Federal Motor Carrier Act, 99 S. W. (2d) 268, said:

"It is manifest that it was the intention of Congress for the Interstate Commerce Commission to co-operate with the various states in the administration of the federal law. That the federal law does not displace entirely the state laws upon this subject is too plain for argument. It is only where there is an actual and distinct conflict between the laws that the state law will be displaced, and then only as to the part of the state law in actual conflict with the federal law. 9 Tex. Jr. p. 288 para. 20, and cases cited; 12 C. J. p. 15, para. 13, and cases cited. That it was the purpose of the federal law to co-operate with the states in the administration of that law is plainly set forth in its provisions."

"An analysis of the act clearly shows that it was the purpose of Congress, in enacting this law, to delegate to the Interstate Commerce Commission the exclusive authority to pass upon the application of a motor carrier engaged exclusively in interstate commerce on the highways for a certificate of public convenience and necessity. Such construction of the law does not deprive the state from protecting its highways and the public safety by reasonable and uniform regulations, and exacting reasonable compensation for the use of such highways. Michigan Public Utilities Commission et al v. Duke, 266 U. S. 570, 45 S. Ct. 191, 69 L. Ed. 445, 35 A.L.R. 1105; Buck v. Kuykendall, 267 U. S. 307, 45 S. Ct. 324, 69 L. Ed. 623, 33 A.L.R. 286. It is not

necessary to discuss here the extent of the power of a state to make such rules and regulations, nor to define them, because that question is not before us."

In *Texport Carrier Corporation* v. *Smith*, 8 Fed. Supp. 28, decided August 27, 1934, by a three judge Federal Court for the Southern District of Texas, the principal question under consideration was whether the Railroad Commission of Texas had authority to deny a permit to an interstate contract motor carrier for the transportation of interstate commerce over the highways of the State of Texas. (The same State authority for operations over Texas highways is required of interstate common carriers as of contract carriers.) The Court said:

"The Commission, when operating within the sphere of its powers as statutory administration to protect the highways of the State from injury and destruction, and to secure the safety and convenience of those primarily entitled to travel thereon, has authority over contract carriers hauling interstate commerce to regulate and prohibit, as well as over those hauling intrastate.

In the case of an interstate carrier, as in the case of an intrastate carrier, if the order refusing a permit to a contract carrier hauling goods rests on findings grounded on considerations of highway safety and convenience, the same presumption attends the order and findings and the same burden is on the complainant to overthrow them. Wald Storage & Transfer Co. v. Smith, 290 U. S. 596, 54 S. Ct. 129, 78 L. Ed.

524; Bradley v. Public Utilities, 289 U. S. 92, 53 S. Ct. 577, 77 L. Ed. 1053, 85 A.L.R. 1131; cf. Interstate Transit Inc. v. Lindsey, 283 U. S. 186, 51 S. Ct. 380. It is only when the Commission has undertaken to exercise control not over the safety of the highways and of the traveling public, but over the commerce itself, that its orders refusing permits to interstate carriers are inoperative."

In *Bradley* v. *Public Utilities Commission of Ohio*, 89 U. S. 92, Supreme Court of the United States, in n opinion written by Justice Brandeis, held that n order of a public utilities commission of a State enying a common carrier by motor vehicle a certifiate to engage in interstate commerce is a valid exrcise of the police power of the State, and its effect n interstate commerce is merely incidental, if such n order is made to promote public safety and beause of highway congestion. Other cases announcg the same rule or principle are: *Wald Storage Transfer Co.* v. *Smith, supra; Beard* v. *Smith*, 4 ed. Supp. 61, affirmed Supreme Court of the United ates without written opinion, 290 U. S. 596; *Sage Baldwin*, 55 Fed. (2d) 968; *Stephenson* v. *Binrd*, 287 U. S. 251, and *Sproles* v. *Binford*, 286 U. 274.

ARGUMENT CONTINUED

POINT IV.

If the Texas Motor Carrier Laws as apied to interstate operations as shown un-

der Points II and III are not inoperative because of the Federal Motor Carrier Act, Petitioner has no "Grandfather Rights" under Section 309 or 306 of the Federal law and the Circuit Court of Appeals properly reversed and remanded with instructions to dismiss the Bill.

Petitioner at the time the Federal Act was passed was not operating upon any of the highways under authority of the Railroad Commission, but his operations were carried on at such time under protection of injunction issued by a state court restraining the commission from enforcing its order denying him authority to use such highways. This injunction was later dissolved by judgment of the Court of Civil Appeals which became final. (R-26-27, R-27 and Respondents Original Exihibits C, D, E, F, G, H, I, and J, all of which exhibits have been printed as supplement to the record in this case for the convenience of the court under supervision of its clerk). An examination of these exhibits which are a part of the evidence in this case will be convincing that the Railroad Commission was justified in denying Petitioner the use of the highways sought to be used.

Petitioner in this suit claims "Grandfather Rights" based upon his unlawful operation upon the highways of the State of Texas. His "right of way" for his interstate operations has never been secured from the constituted authorities of the state, and all of his operations have been as a trespasser

upon the state highways, and unless the state laws have been superseded as herein first stated the mere filing of his application for certificate would confer no new right upon him to continue his unlawful use of these Texas highways. See *Town of Conway* v. *Atlantic Coast Line R. Co.*, 20 Fed. (2d) 250, at page 259 where the court in speaking of a similar situation had the following to say, to-wit:

> "The defendant also contends that under the Transportation Act of 1920 (Act Cong. approved Feb 28, 1920, 41 Stat. 456), as construed by the Supreme Court of the United States in Dayton-Goose Creek R. R. Co. v. U. S., 263 U. S. 456, 44 S. Ct. 169, 68 L. Ed. 388, 33 A. L. R. 472, R. R. Commission of California v. Southern Pacific Co., 264 U. S. 331, 44 S. Ct. 376, 68 L. Ed. 713, and New England Divisions Case, 261 U. S. 184, 43 S. Ct. 270, 67 L. Ed. 605, it is not lawful for it now to abandon any part of its right of way without a certificate of approval from the Interstate Commerce Commission. By subdivision 18 of section 402 of the Transportation Act (41 Stat. 477 (Comp. St. Sec. 8563)) it is provided that no carrier or railroad subject to the act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall have first been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. It is conceded that no such certificate has been given in the case at bar.
> "The theory of the defendant is that the Transportation Act, as construed by the cases referred to, constitute a new departure, and sought affirmatively to build up a system of railways pre-

pared to handle promptly all the interstate traffic of the country, and that the power to order the abandonment of any track is now lodged solely in the Interstate Commerce Commission, and no change can be made without its consent. But I do not construe the act to apply to a case like the one at bar. The defendant does not seek to abandon a portion of its track. Nor does the town seek to compel it to abandon a portion where it has a legal right to remain. The act of Congress was intended to apply to those cases where the railroad company seeks to abandon a portion of its line of railroad, and possibly where it is sought to compel it to make such abandonment; but it was not intended to apply to those cases where the railroad is a trespasser, or where the railroad's occupancy is only by permission, and such permission has been revoked. "When the town in this case revoked the permission theretofore given to occupy the street, the railroad company then had no further right in the same. It may be doubted whether Congress could constitutionally deprive the town of its right to require the defendant to remove its track in such circumstances from its street, and certainly, if such a construction of the act as would render it unconstitutional can be avoided, it should be done. My view is that the act was not intended to apply to a case where the defendant's rights in the premises had ceased, and that no certificate from the Interstate Commerce Commission is necessary, and that this court has full jurisdiction to determine the rights of the parties, and to require the removal of the track if the railroad has no further legal right to keep it there."

The words, "in bona fide operation," as used in

this Federal Motor Carrier Act, we contend were intended to include both actual and legal operation. The trial court in its conclusions of law found that the phrase, "if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935 over the route or routes or within the territory for which the application is made," properly construed relates to the actual, physical, continuous and regular operation of such carrier on June 1, 1935, and continuously ever since, and concludes as a matter of law Petitioner was in bona fide operation on these particular highways of the State of Texas alleged in Petitioner's Bill of Complain on and prior to June 1, 1935. These conclusions of law by the Court were based upon the testimony that the Petitioner was in actual operation in interstate commerce on June 1, 1935, although the record discloses that he never had any authority from the Railroad Commission of Texas to use the particular highways in his alleged operations.

It is a cardinal principle of statutory construction that provisions of statutes must be construed so as to give effect to every clause or word therein set forth. *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208. *Pillsbury Flour Mills Co.* v. *Great Northern Ry. Co.*, 25 Fed. (2d) 66, 69, *Van Dusen Harrington Co.* v. *Northern Pac. Ry. Co.*, 32 Fed. (2d) 466, 468. *Updike Grain Co.* v. *Chicago & N. W. Ry. Co.*, 35 Fed. (2d) 486, 487. *W. P. Brown & Sons Lumber Co.* v. *Louisville & N. R. Co.*, 82 Fed. (2d) 94, 95.

The Commission, in a long line of cases, has followed the same principle in construing and applying tariffs. *Wisconsin Bridge & Iron Co.* v. *Illinois Term. Co.*, 169 I.C.C. 197, 199. *Iola Cement Mills Traff. Assn.* v. *Atchison, T. & S. F. Ry. Co.*, 169 I. C.C. 367, 375.

Applying this rule of statutory construction to the determination of the meaning of the words "bona fide," as used in the act, it is obvious that some meaning must be ascribed to them. The Congress might have used the term "actual" had it intended only that modification of "operation," or it might have used the word "lawful" as an adjective. But the Congress did not use either of these terms for the obvious reason that it preferred a term and intended to describe an operation which was more than actual and more than legal or valid—one which was sufficiently inclusive as to embrace both of these terms. "Bona fide" does exactly that. If this meaning is not applied to the term, "bona fide" it is impossible to ascribe any other reasonable meaning to those words.

It is conceivable that a carrier might take pains to qualify under the existing laws of a great many of the states and thus be in a position to operate legally over a vast territory without actually performing service in any of it. To escape this result the Congress used the words "bona fide." The conclusion is also inescapable, as developments in the administration of the act conclusively prove, that a great many were actually operating, both regularly

and irregularly, without any attempt to comply with existing, applicable state laws and, in fact, in wanton disregard of the same. To avoid that result the Congress used the words "bona fide."

If only actual operation were intended the words "bona fide" would be surplusage. The Congress obviously sought language to apply both to actual operations and to legal operations by providing that one who was actually in operation, meaning with some degree of regularity and intent to continue and who conducted such operation in compliance with applicable laws and who therefore, by reason of the reality of such operations, was in "bona fide operation" might be exempted from the formality of proving that his service is required by the public necessity or that he is fit, willing and able to comply with the act and that his operations are consistent with the public interest.

The laws of Texas as of June 1, 1935, and thereafter, enacted under the State's police power, required each motor carrier for hire whether engaged in interstate or intrastate commerce to have a permit from the Railroad Commission. In passing upon applications involving interstate commerce under these laws, and the decisions of United States Courts construing them, the Commission was only authorized to give consideration to the structure and preservation of the highways and the safety of the public. Petitioner never had a permit or certificate from the Railroad Commission of Texas authorizing him to conduct his operations in interstate com-

merce and it seems, therefore, readily apparent that he was not in bona fide operation within the purview and meaning of the "grandfather" provision of the Motor Carrier Act of 1935 over the alleged highways in Texas. He sought by this injunction to be protected in operations over many miles of highways of Texas. The fundamental purpose of the Federal Act is to regulate in the interest of the public interstate transportation by motor vehicles for hire.

In *Motor Transit Company* v. *Railroad Commission*, 189 Cal. 573, 209 Pac. 586, the Supreme Court of California gave consideration to a statute regulating motor carriers, and which contained a so-called Grandfather Clause. The Court made a statement which is applicable to the duties of the Interstate Commerce Commission under the Federal Motor Carrier Act. It said:

> "The primary purpose of the legislature in enacting this statute was not to confer a franchise upon the operating companies, but to give into the power of the Commission for regulation and control in the interest of the public the operation of all auto stages for transportation. It did this by requiring every auto transportation company to secure from the Commission a certificate of public convenience and necessity. It relieves from the necessity of obtaining such certificates the companies actually operating in good faith at that time. The purpose in so exempting such companies was to refrain from interfering with the operations as then carried on—in other words, to confirm in these operators the rights

they were at that time exercising. But such exemption was obviously only to the extent of the operations then conducted."

In the *Golden Gate Ferry Company* v. *Railroad Commission*, 268 Pac. 355, the Supreme Court of California considered a claim of "grandfather" rights and announced the following rule:

> "The safe, definite rule, and the one supported by the reason and purpose of the Public Utilities Act, would seem to us to be to construe the language 'operating vessels in good faith' to mean operating them in good faith in the essential and inherent features of the service sought to be continued after the effective date of the Act."

As hereinbefore stated the "grandfather" rights constitute an exemption from the general terms of the law and the burden is upon those claiming the exemption to prove that he is entitled to it. This is a well established and familiar rule. In the case of *Camas Stage Company* v. *Kozer*, 209 Pac. 95, an exemption was claimed from the payment of said motor license fees. In holding that the plaintiff was not entitled to the exemption the Court said:

> "Moreover, it is a familiar rule of frequent application that he who would shelter himself under an exemption clause must present a clear case, free from all reasonable doubt, as such laws, being in derogation of the general rule, must be strictly construed as against the person claiming the exemption and in favor of the public. 17 R.C.L. 522; Northwest Auto Co. v. Hurlburt, ... Ore. . . . , 207 Pac. 161; Wallace v.

> Board of Equalization, 47 Ore. 584, 86 Pac. 365. In the enforcement of the law under consideration, the collection of a fee for registration is the rule and exemption the exception; therefore, the burden of establishing it is upon him who claims it. I. Cooley, Taxation, 3rd Ed. page 456."

It is also a familiar rule that a statute should be construed in light of the general purpose of the Act. *Norwegian Nitrogen Products Co.* v. *U. S.*, 288 U. S., 294, 77 L. Ed. 796, where the court said in construing the duties of the Tariff Commission:

> "The answer will be found in a consideration of the ends to be achieved in the particular conditions that were expected or foreseen."

In *Piedmont & N. R. Co.* v. *I.C.C.*, 286 U. S. 299, 76 L. Ed. 1115, the Supreme Court of the United States, in construing the Transportation Act, said:

> "The transportation Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended. Spokane & I.E.R. Co. v. United States, 241 U. S. 344, 60 L. Ed. 1037, 36 Sup. Ct. 668."

The Courts have stated that for one to be a bona fide actor it is necessary that he has complied or is proceeding to comply in good faith with the requirements of the applicable laws. This rule was announced by the Supreme Court of the United States in the case of *Hosmer* v. *Wallace*, 97 U. S. 575. The

court in that case defined a "bona fide pre-emption claimant" as follows:

> "The term bona fide, as applied to the pre-emption claimant, does not change the qualifications of such claimant, nor the conditions upon which, under the general law, a settlement with a view to pre-emption is permitted. It was intended to designate one who had settled upon land subject to pre-emption, with the intention to acquire its title, and had complied, or was proceeding to comply, in good faith with the requirements of the law to perfect his right to it."

In the case of *Godwin* v. *Tuttle*, 141 Pac. 1120 (Oregon 1914), suit was brought by the trustee in bankruptcy to recover a certain stock of goods which had belonged to the bankrupt estate. The defendant claimed to be a "bona fide holder" of the goods within the meaning of the bankruptcy law authorizing the trustee in bankruptcy to avoid any transfer by the bankrupt which any creditor might have avoided "unless he was a bona fide holder for value prior to the date of the adjudication." It seems that the defendant took possession of the stock of goods without complying with the statutes covering sales in bulk, and which required notice to creditors in case of such sale. The court held that defendant, having taken possession of the goods in violation of this Bulk Sales Law, could not be a bona fide holder for value within the meaning of the bankruptcy law.

Another decision holding that where there is a violation or non-compliance with a law, there can

be no bona fide transaction is the case of *Muzenich* v. *McCain*, 274 S. W. 88 (Missouri), where it was held that a purchaser of an automobile without compliance with the statute requiring a bill of sale and proper transfer of the license and registration certificate, could not be a "bona fide purchaser" so as to be protected under a conditional sales statute against defects in his assignor's title.

Deffeback v. *Hawke*, 115 U. S. 382, involved the right of a party who claimed certain land and had made improvements thereon. The United States Supreme Court, speaking through Mr. Justice Field, said:

> "There can be no color of title in an occupant who does not hold under any instrument, proceeding or law, purporting to transfer to him the title or to give him the right of possession. And there can be no such thing as good faith in an adverse holding, where the party knows that he has no title, and that, under the law, which he is presumed to know, he can acquire none by his occupation."

In the recent case of *Ranier* v. *Western Union Tel. Co.* (Mo. App.), 91 S. W. (2d) 202, it was held that a contract for transportation of goods in interstate commerce was unlawful because the truck owner had failed to obtain a permit as required by the State statute and consequently neither the truck owner nor the owner of the shipment, who had knowledge of the lack of a permit, could recover from the telegraph company for delay to the shipment resulting from delayed transmission of money.

In *Crouch* v. *First National Bank* (Ill.), 40 N. E. 974, 979, the court said:

> " 'Good faith' means 'honest, lawful intent; the condition of acting without knowledge of fraud, and without intent to assist in a fraudulent, or otherwise unlawful, scheme.' And. Law. Dict."

In *Motor Transit Company* v. *Railroad Commission*, 189 Cal. 573, 209 Pac. 586, and in *Red Ball Transit Co.* v. *Public Utilities Commission*, 112 Ohio 462, 147 N. E. 762, the Supreme Courts of California and Ohio, respectively, held that bona fide operation or good faith operation means legal operation.

In *Motor Transit Company* v. *Railroad Commission, supra*, it appears that California had enacted in 1917 a motor carrier act requiring certificates of public convenience and necessity, but that no certificate was required of those operating in good faith prior to May 1, 1917. The statute was amended in numerous particulars in 1919. One of the amendments repealed the section relating to the requirement of certificates of convenience and necessity and substituted in lieu thereof a new section containing the following language:

> " * * * but no such certificate shall be required of any transportation company as to the fixed termini between which or the route over which it is actually operating in good faith at the time this Act becomes effective. * * * "

The California Supreme Court held that the words above set forth "at the time this Act becomes effec-

tive," meant June 22, 1919. Motor Transit Company had commenced certain operations subsequent to May 1, 1917, but prior to June 22, 1919. It claimed that under the 1919 statute it was entitled to continue such operations without a certificate, because it was so operating on and prior to June 22, 1919. The court rejected this claim, holding that such operations were being conducted in violation of the terms of the 1917 statute, and hence were not operations in good faith. In connection with this point, the court said:

> "It is the further contention of the petitioner that 'Auto, Stage and Truck Transportation Act' (Statutes 1917, Ch. 213, Sec. 5), having been subsequently amended by the Statutes of 1919 (Statutes 1919, Ch. 280, Sec. 3), the latter statutes must govern and control the rights of petitioners. In the former statute no certificate was required of those operating in good faith prior to May 1, 1917. The latter statute relieves from the necessity of securing such a certificate companies operating in good faith 'at the time this Act becomes effective.' (June 22, 1919). Manifestly, those companies commencing operations subsequent to May 1, 1917, without the certificate of public service and convenience required by the statute were violating the statute, and we cannot hold it to have been the intention of the legislature to confer a franchise upon auto stage companies by virtue of their operations prior to the date the amendment went into effect, when such operations, by the very terms of the former statute, would have been illegal. We are therefore constrained to hold that any rights to maintain local service without a certificate of public convenience and

necessity must have been acquired prior to May 1, 1917."

In the *Red Ball Transit Company* v. *Public Utilities Commission, supra*, the Red Ball Transit Company. a corporation had applied to the Ohio Public Utilities Commission for a certificate of convenience and necessity on the sole ground that it was operating in good faith as a motor transportation company on April 28, 1923, the date provided in the Ohio statute to fix the rights of existing operators in good faith. The certificate was issued, but was later revoked by the Commission on the ground that the applicant was not originally entitled to the certificate. It appears that there were two separate grounds for revocation, one of which was the following: Although the corporation was in fact doing business in Ohio as a motor transportation company on April 28, 1923, it was a foreign corporation, and had not been qualified to do business in Ohio, and did not so qualify until June, 1923. The Public Utilities Commission, whose order was approved by the Ohio Supreme Court, held that by reason of the foregoing the corporation was not operating in good faith in Ohio on April 28, 1923. The order of the Commission appearing in and approved in the opinion of the court is as follows:

> "The Commission further finds that the Red Ball Transit Company, a corporation, was not actually operating in good faith on April 28, 1923, in the State of Ohio, inasmuch as it is a foreign corporation, and did not comply with the laws of the State of Ohio respecting foreign corporations doing business in Ohio until June 1923.

> "For the reasons set out above, the Commission finds that the allegations contained in the affidavit filed by the company are untrue; that the certificate heretofore ordered to be granted to company was obtained through misrepresentation and false statements, and should therefore be revoked."

In California there was a statute of 1917 which is referred to in the Opinion of the Supreme Court of that state in *Motor Transit Company* v. *The Railroad Commission*, 209 Pac. 586, as "the former statute" and also a statute of 1919 referred to in the opinion as "the latter statute." In holding that a carrier by motor vehicles which had been operated in violation of the "former statute" could not be said to have been operating in good faith when the "latter statute" was passed, at page 590:

> "In the former statute no certificate was required of those operating in good faith prior to May 1, 1917. The latter statute relieves from the necessity of securing such a certificate companies operating in good faith "at the time this act becomes effective" (June 22, 1919). Manifestly, those companies commencing operations subsequent to May 1, 1917, without the certificate of public service and convenience required by the statute were violating the statute, and we cannot hold it to have been the intention of the Legislature to confer a franchise upon auto stage companies by virtue of their operation prior to the date the amendment went into effect, when such operation, by the very terms of the former statute, would have been illegal."

We think the foregoing cases fully establish the

proposition for which we contend, that the Petitioner by his failure to comply with all of the applicable state laws regulating certificates and permits to engage in interstate commerce over the highways of Texas was not in bona fide operation within the meaning of the Federal Motor Carrier Act.

ARGUMENT CONTINUED

POINTS V AND VI

The Texas Motor Carrier Statutes as heretofore held applicable to interstate transportation of property for hire by motor carriers are not regulations of interstate commerce or directed against such commerce but are recognized police powers reserved to the State to regulate the rights of the State and the public as to the use of its highways and preservation thereof, and promotion of safety thereon, and since such State regulations are equally applicable to interstate as well as to intrastate carriers without discrimination and they do not conflict with any expressed or assumed will of Congress expressed or necessarily implied in the Federal Act, they must be sustained, since the two acts can be reconciled and consistently stand together.

There is squarely presented to this Court the issue as to whether or nor the Railroad Commission of Texas operating within the sphere of its powers as a

statutory authority to protect the highways of the State from injury and destruction and to secure the safety and convenience of those primarily entitled to travel thereon has the authority, since the passage of the Federal Motor Carrier Act, to control the use of the highways by persons seeking such use in the prosecution of their business as carriers for hire thereupon and to deny such use to those who seek to so use such highways wholly in interstate commerce. The facts in this case present this precise issue to this Court. The petitioner on the first day of May, 1934 filed with the Railroad Commission of Texas an application for a certificate as a common carrier motor carrier operator in interstate commerce. The Commission heard the application after notice of the hearing had been given, hearing a mass of testimony and entered its Order on July 14, 1934, denying said application, setting out fully in said Order the reasons therefor (Exhibits C, D, and E, which are printed as supplement to the Record herein). An injunction against the Commisison restraining it from enforcing the order of denial was secured and the case went to the Court of Civil Appeals for the Third District, which dissolved the injunction. (90 S. W.(2d) 581).

The Court in its opinion copies somewhat at length from the Findings of Fact of the Railroad Commission of Texas as contained in Exhibit "E". It appears from this Exhibit and the opinion of the Court of Civil Appeals that the Commission had had before it a number of applications of the same na-

ture and in order to determine whether certain highways of the State were carrying all of the truck traffic that could safely be entrusted thereupon without unreasonably interfering with the use thereof by the general public it had held a number of hearings in various portions of the State in order that local officials familiar with the condition of the highways, and the amount of traffic that such highways were forced to carry, might be able to testify. It appeared that more than one hundred County Judges, Commissioners and others, newspaper editors, merchants testified against granting of additional truck permits over the particular highways which petitioner sought to use. The testimony conclusively shows that it was impossible for an ordinary passenger car and a truck of a width permitted under the law to pass each other upon these highways without one or both vehicles being compelled to traverse the dirt shoulder; the trucks, by reason of their weight, would hold the center of the road during wet weather and that this added to the hazards of the public in using the highways. It appeared from the testimony in this case that at the time this application was heard 500 trucks were authorized to operate as common carriers and 122 trucks as contract carriers over one of the principal highways which petitioner sought to use, and that in addition there were several hundred Special Commodity trucks operating over this highway. Upon these Findings of Fact by the Railroad Commission of Texas, as to the condition of the highways sought to be used by petitioner and the congestion thereon as to traffic, the Commission denied the permit.

The case of *Barnwell Bros.* v. *South Carolina Highway Department*, 17 Fed. Sup. 803 (Reversed on other grounds, 58 Sup. Ct. 510), was an attack upon the load limit of the State of South Carolina and a suit for injunction to restrain its enforcement as against interstate motor carriers. One of the grounds of attack was that Congress under the Federal Motor Carrier Act had superseded State laws as to the size and weight of vehicles, and the Court held that the congressional act was not subject to this construction, but clearly indicated that it was not within the purpose of Congress to take this police power from the states, and as to this issue raised in this case the Court said:

> "To sum up on this feature of the case, we do not think that there is anything in the language or in the history of the act which shows an intention on the part of Congress to regulate the size and weight of vehicles; and it is unreasonable to think that Congress would intend, by vague general language, to clothe the Commission with power to regulate a matter of such difficulty in which detailed regulations had already been prescribed by all of the 48 states, and thereby strike down all state regulations affecting the matter and leave the subject unregulated until such time as the Commission might act. Our conclusion as to the proper interpretation of the act is supported by the following recent decisions; L & L Freight Lines et al v. Railroad Commission of Florida (D. C. Fla.) 17 F. Sup. 13; Lower v. Stautamire, 123 Fla. 135, 166 So. 310; Railroad Commission v. Southwestern Greyhound Lines (Tex. Civ. App.) 92 S. W. (2nd) 296."

In the same case the Court in discussing the limit of the power of states in this regard said:

> "It must not be forgotten that the roads, in the final analysis, belong to the people. They are held by the states in trust for the people, who are entitled to make a reasonable use of them."

and that

> "Any regulation limiting size and weight, having reasonable relation to the preservation of the highways or to the safety of persons using them, must be upheld; and we do not doubt the power of the states in the reasonable exercise of the police power, to bar certain types of vehicles entirely from their roads, or entirely to forbid the use of trucks on certain of the roads provided other roads are available for the use of traffic of this character."

and in summing up the law as applicable to the relative rights of the states and of the federal government in regard to legislation with respect to use of the highways, said:

> "The law applicable to the situation is, we think, reasonably clear. There can be no doubt as to the power of the state to prescribe reasonable regulations limiting the size and weight of vehicles upon its highways, both for the sake of preserving the highways themselves and for the protection of the public using them. There is a broad range of legislative discretion with respect to such matters, and legislation is not to be condemned merely because the courts may

not agree as to its wisdom. Sproles v. Binford, 286 U. S. 374, 388, 52 S. Ct. 581, 585, 76 L. Ed. 1167; Morris v. Duby, 274 U. S. 135, 47 S. Ct. 548, 71 L. Ed. 966. But as indicated by the court in the case last cited (274 U. S. 135, at page 145, 47 S. Ct. 548, 550, 71 L. Ed. 966), such regulation must not be so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contribution toward the building of the highways. In other words, the states in the exercise of their inherent police power may regulate the use of the highways for the protection of the highways themselves and the safety of the public using them, and certainly in the absence of legislation by Congress may make such regulation applicable to interstate as well as intrastate traffic; but they may not adopt arbitrary regulations, not reasonably necessary for the protection of the highways or of the public, which will directly burden interstate commerce, even though such regulations may not discriminate as between commerce which is interstate and that which is not."

See also *L & L Freight Lines* v. *Railroad Commission of Florida*, 17 Federal Sup. 13; *Werner Transportation Co.* v. *Hughes*, 19 Federal Sup. 425; *Aero Mayflower Transit Co.* v. *Georgia Pub. Serv. Comm.*, 295 U. S. 285.

If the size and weight of motor vehicles have this undoubted relationship to the preservation of the highways and the safety of their use and Congress has not undertaken to regulate such sizes and weights under the Federal Motor Carrier Act, it seems to us that the conclusion is inescapable that

it was not intended by the said Act to deprive the states of their police power to determine as to whether any of its highways were in such condition, construction or repair, or the traffic thereon was such as to require a refusal of their use to persons engaged either in interstate or intrastate transportation for hire. The importance to the states of construing the Federal Motor Carrier Act so as to preserve this inherent police power of the states is accentuated by the provisions of Section 208 of the Act under the terms and provisions of which no condition or limitation can be placed upon the certificate granted by the Interstate Commerce Commission for interstate transportation that will restrict the right of the person to whom such a certificate is issued "to add to his or its equipment or facilities over the routes between the termini or within the territory specified within the certificate as the development of the business and the demands of the public shall require." Since, under this provision of the Federal Motor Carrier Act, the owner of an interstate certificate to engage in interstate commerce may without limit add to his or its equipment over the routes authorized by the interstate certificate, the states in the protection of their own highways and of the safety of the public thereupon would be crippled to the extent that its authority and powers would be nullified. It is further provided in said Section that carriers owning an interstate certificate may deviate from the route over which or the fixed termini between which it is authorized to operate. This again would give any common carrier in interstate commerce the right to use any of the

highways of the state, and the state's authority to determine as to whether they are in condition for use is nullified.

The complete justification in the action of the Railroad Commission of Texas in denying the petitioner authority to use the particular highways in interstate commerce is fully established in this case by the testimony of George A. Knapp as appears from his affidavit in the Record.

> "As at present constituted, the highway system of Texas comprises a total length of approximately 190,000 miles which includes the state designated highways having a mileage of 21,046, being approximately 11 percent of the total. The state designated highway system as composed includes a substantially large mileage of roads which in 1917 when the Texas State Highway Commission was created, were carved out of the county roads as they then existed. Highway requirements, considering the size and weight of the vehicles using the highways at that time, were adapted only to light automobiles, an occasional light truck and horse drawn vehicles. The best evidence of this fact is that the highway bridges were designed almost uniformly at that time for a safe load of 5 tons. While these inferior highways inherited by the State Highway Department from the counties, have in most instances been materially improved, and in many cases completely replaced by pavements of modern design, nevertheless, there are considerable lengths of the old roads which still remain and which occur at intervals throughout the present state system. These pavements may be identified by their non-rigid

types of constructions, their widths being invariably 18 feet or less, their sharp curves, steep grades, high crowns, irregular surfaces, eroded edges which may or may not have been patched, narrow earth shoulders and lightly constructed bridges. (R-48-49)

"Exhibit 2-A shows the width of the non-rigid pavements, excepting earth in the highway routes specified in the application filed by A. E. McDonald with the Texas Railroad Commission, the total length of which non-rigid pavements is 487.1 miles of which 15 percent are 16 feet or less, 60 percent are from 16 to 18 feet wide and total of 75 percent are 18 feet wide or less. (R-51)

"Exhibit 3-A shows the width of rigid pavements in routes specified in the application filed by A. E. McDonald, the total length of which rigid pavements is 607.5 miles of which 9 percent are 16 feet or less, 28 percent are from 16 to 18 feet wide, or a total of 37 percent which are 18 feet wide or less. (R-52)

"The large proportions of the total of both rigid and non-rigid pavements, which are shown in these Exhibits to be 18 feet wide or less, identified their inadequacy for the use of vehicles having a width in excess of 7 feet when consideration is given to the following: (R-52)

"The usual width of private passenger automobile is 6 feet or less. A minimum width of two lane pavement for the use of such vehicles may not be reasonably less than 16 feet. It is then obvious, in order to secure the same degree of mobility, clearance, and safety, that for vehi-

cles 7 feet wide, the pavement would have to be 18 feet wide and for the same reason, vehicles 8 feet wide would require a pavement width of 20 feet. Numerous measurements of the heavy commercial trucks made by me, show that this class of vehicle almost invariably measures the full width of 8 feet permitted by Texas law. These pavements of inadequate width for the use of the wider vehicles occur at frequent intervals throughout the length of practically all highways of the state including those in the routes specified in the application of A. E. McDonald." (R-52)

From this it appears that over the routes sought to be traversed by the petitioner there were 487 miles of non-rigid pavement 15 percent of which were 16 feet or less wide, 60 percent are from 16 feet to 18 feet and a total of 75 percent 18 feet wide or less; that the rigid pavements over said routes consist of 607 miles 9 percent of which are 16 feet or less, 28 percent from 16 to 18 feet wide, or a total of 37 percent of which are 18 feet width or less. He testifies that these pavements which are of inadequate width for the use of wider vehicles occur at frequent intervals throughout the length of practically all highways of the State including those in the routes specified in petitioner's application. This witness further testified as to the population of the State and the motor vehicle registrations in counties traversed by the highways over which Petitioner sought to operate, that:

"Attached hereto and made a part hereof is Exhibit 8 which sets forth the population and motor vehicle registrations in the counties tra-

versed by the identical highways shown in Exhibit 1-A, being those highways specified in the application of A. E. McDonald filed with the Texas Railroad Commission, as also a comparison of the population and motor vehicle registrations of such counties with similar date for the entire state of Texas. The summary of Exhibit 8 shows that while the counties along the routes applied for number only 13 percent of the total counties of the entire state the population of such counties amounts to 38 percent and the motor vehicle registrations 41 percent of the entire state. This study is not intended to show actual traffic over the highways, but rather the fact that these highways traverse a densely populated portion of the state, being approximately 3 times the average of the entire state, while the density of motor vehicle registrations is even greater. All of the traffic represented by these motor vehicle registrations is potential to the highways in their respective counties which are sought to be traversed by the applicant. Because of the fact that congestion on any highway may not be considered from the viewpoint of average use, but rather maximum or peak use, the facts of such greatly heavier density of population and motor vehicle registrations become significant in this case. It is to be noted that potential traffic from adjoining counties and from outside the State, all of which forms a substantial part of the actual traffic along these routes, has been omitted from the study.

"All the foregoing is offered as evidence identifying inadequacies in the highway and bridges of the state designated highway system to sustain heavy truck traffic without creating condi-

tions which will unreasonably interfere with the public use of such highways and bridges." (R-64-65).

This testimony taken in connection with the findings of the Railroad Commission of Texas in denying petitioner's certificate conclusively establishes the inadequacies of the highways and bridges to sustain any additional truck traffic without creating conditions to bring about damage to the highways, and unreasonable interference with the use by the public of such highways and bridges. The police power sought to be exercised by the state is a reasonable one and its exercise in this particular case has been reasonable; and petitioner does not question the reasonableness of the action of the state authorities, but bases his cause of action on grounds that the State laws as applied to him have been entirely superseded by the Federal Act. It has already been shown in this brief that Texas Motor Carrier Laws as construed applicable to interstate carriers are sustained as an exercise of the State's police power and not as a regulation of interstate commerce. *Sage* v. *Baldwin*, 55 Fed. (2d) 968; *Texport Carrier Corporation* v. *Smith*, 8 Fed. Supp. 28; *Wald Storage & Transfer Co.* v. *Smith*, 4 Fed. Supp. 61; *Galveston Truck Line Corp.* v. *Allen*, 2 Fed. Supp. 488; *Stephenson* v. *Binford*, 50 Fed. (2) 509.

The above cases and the evidence in the case at bar shows a necessity for the exercise of this reserved police power of the State, and this court in a long line of decisions has heretofore recognized the exercise of such power with limitation that it can-

not be operated to "*obstruct foreign commerce or inter-state commerce beyond the necessity for its exercise.*" See *Bowman* v. *Chicago & N. W. Ry. Co.* 125 U. S. 465; *Railroad Company* v. *Husen*, 95 U. S. 465; *Cleveland R. Co.* v. *Ill.*, 177 U. S. 514; *Hendrick* v. *Maryland*, 235 U. S. 610; *Kane* v. *New Jersey*, 242 U. S. 160; *and Robbin* v. *Shelby County Taxing District*, 120 U. S. 489 at page 493, par. 3, reading in part as follows:

> "It is also an established principle, as already indicated, that the only way in which commerce between the states can be legitimately affected by state laws, is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health, and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities."

The Federal Motor Carrier Act does not contain any provision conflicting directly or impliedly with the applied exercise of the State's police power, and for such reason the State law should not be held to be superseded. See: *Kelley* v. *State of Washington*, 58 Sup. Ct. 87, where this court appropriately applied words used in *Savage* v. *Jones*, 225 U. S. 501, as follows:

> "*But the intent to supersede the exercise by the state of its police power as a matter not cov-*

ered by the Federal Legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state."

The above quotation announces a principle of law that this court has applied many times as shown by the citations and references in the case of *South Carolina State Highway Commission* v. *Barnwell Bros.*, 58 Sup. Ct. 510.

Certainly it cannot be claimed that the Federal Act has caused all the State's police powers to become inoperative as applied to interstate commerce. It could be argued with equal force that the Texas Speed Laws have become inoperative because of the Federal Act as to interstate carriers, but the Act clearly does not legislate on the subject of speed regulation, and until Congress definitely legislates upon the subject of speed regulation or highway conservation and regulation of traffic to prevent undue congestion and use of such highways, the State laws are operative. See: *M. P. R. Co.* v. *Larabee*, 53 Law Ed. 352; *Atlantic Coast Line R. R. Co.* v. *Georgia*, 58 Law Ed. 1312, where the State in absence of legislation by Congress specifically regulating headlights on locomotives may in exercise of its police power make requirements as to such headlights. *Sherlock, et al*, v. *Alling, Adm.*, 93 U. S. 105, where court said until Congress makes some regulation touching regulation of liability of parties for marine

rts resulting in death of persons injured the State ws applied. Other cases showing State free to act ntil Congress acts by assuming the entire field or irectly in conflict with the State law are as follows:

Texas & Pacific Ry. v. *Abilene Oil Co.*, 204 U. S. 26, where right of shipper to sue for damages un- er state law was abrogated on the ground that e reasonableness of the interstate rate is a mat- r the Interstate Commerce Commission must pass pon, as the Interstate Commerce Act dealt specifi- lly with the subject of rates. In *M. K. & T. P. Ry.* o. v. *Harris*, 234 U. S. 412, it was held the Carmack mendment did supersede state laws as to carrier's ability for loss of interstate shipment, *but* did not terfere with state statute incidentally affecting the emedy of enforcement by allowing a reasonable at- rney fees on small claims not over $200.00. The mendment made no provision for attorney fees and exas Statute was sustained as an exercise of the ate's police power, and the court said in absence direct conflict with the Federal Act it must be sus- ined. In *Chicago R. I. and Pac. Ry. Co.* v. *Hard- ick Farmers Elevator Co.*, 226 U. S. 427, court said innesota Reciprocal Demurrage Act was specifi- lly superseded by the Hepburn Act since the two ts were in direct conflict as each dealt with the me subject. 251 U. S. 27, *Postal Tel.-Cable Co.* *Warren-Godwin Co.*, where it was shown that the t of Congress in 1910 to regulate Interstate Com- erce dealt sufficiently with rates for unrepeated ssages as to supersede state law as to liability

for error in sending such messages. In the case of *Napier* v. *Atlantic Coast Line Co., et al*, 272 U. S. 605, it is held that the Federal Locomotive Boiler Inspection Act, as amended by Act March 4, 1915 and Act of June 7, 1924, had superseded all state laws regulating equipments on locomotives, but this case gives a history of the law as it existed prior to 1915 and shows specific action was then required by Congress to supersede a state law requiring a particular appliance on interstate equipment and gives many cases showing this court's approval. Other cases illustrating the powers of Congress to supersede and occupy entire field are *International Shoe Co.* v. *Pinkus*, 278 U. S. 261; Federal Bankruptcy held exclusive; *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370; Federal Hours of Service Act held exclusive; *New York Cent. Ry. Co.* v. *Winfield*, 244 U. S. 146; Federal Employee's Act held exclusive on the subject of the "responsibility of interstate carriers by railroads to their employees injured in such commerce." In all of these cases where act of Congress has been held to supersede state police powers, the Congress has definitely used language to indicate its intent to supersede, and we believe if it had intended to supersede the Texas police powers involved in this case, it would have spoken specifically on the subject of highway conservation and traffic regulation. Under decisions of this court in the Minnesota Rate Case, 230 U. S. 412 and *Houston E & W T. R. Co.* v. *U. S.*, 234 U. S. 342, if the Act grants the authority to regulate as to matters herein involved, certainly it could not be contended the power may be exercised until the Interstate Com-

merce Commission makes findings showing a necessity for its action to protect interstate commerce.

ARGUMENT CONTINUED

POINT VII

In the absence of any provision in the Federal Motor Carrier Act to supersede the police power of the states as applied and recognized at the time the Federal Act was passed, it cannot be supposed that Congress had "attempted to override the accustomed authority of the states without the provision of a substitute."

The "accustomed authority of the states" prior to and at the time the Federal Act was passed is thoroughly reviewed and established in this brief under our argument of Points V and VI.

This court in the Minnesota Rate Case, 230 U. S. 412, at pages 420-421, in construing the Interstate Commerce Act used language appropriate to our point here as follows:

> "Having regard to the terms of the Federal statute, the familiar range of state action at the time it was enacted, the continued exercise of state authority in the same manner and to the same extent after its enactment, and the decisions of this court recognizing and upholding this authority, we find no foundation for the

proposition that the Act to Regulate Commerce contemplated interference therewith.

"Congress did not undertake to say that the intrastate rates of interstate carriers should be reasonable or to invest its administrative agency with authority to determine their reasonableness. Neither by the original act nor by its amendment, did Congress seek to establish a unified control over interstate and intrastate rates; it did not set up a standard for intrastate rates, or prescribe, or authorize the Commission to prescribe, either maximum or minimum rates for intrastate traffic. *It cannot be supposed that Congress sought to accomplish by indirection that which it expressly disclaimed, or attempted to override the accustomed authority of the States without the provision of a substitute.* On the contrary, the fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the States and the agencies created by the States to deal with that subject. Missouri Pacific Ry. Co. v. Larabee Mills, 211 U. S. 612, 620, 621."

In the case of *South Carolina State Highway Department* v. *Barnwell Bros.*, 58 Sup. Ct. 510, at pages 516-17, this court said:

"Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that

is a legislative, not a judicial, function, to be performed in the light of the congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which, in that field, state power and local interests should be required to yield to the national authority and interest. In the absence of such legislation the judicial function, under the commerce clause, Const. art. 1, Sec. 8, cl. 3; as well as the Fourteenth Amendment, stops with the inquiry whether the state Legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought. Sproles v. Binford, supra; Stephenson v. Binford, 287 U. S. 251, 272, 53 S. Ct. 181, 187, 77 L. Ed. 288, 87 A. L. R. 721."

The point here is sound because the Federal Government's control over interstate commerce may be protected by the courts when the states' exercise of police powers are administered in such a manner as to constitute an undue burden on interstate Commerce, or as to discriminate as to such commerce. *Morris* v. *Duby*, 47 Sup. Ct. 550, *South Carolina State Highway Department* v. *Barnwell Bros.*, 58 Sup. Ct. 510, *Railroad Co.* v. *Husen*, 95 U. S. 465; *Bowman* v. *Chicago & N. W. Ry. Co.*, 125 U. S. 465; *Houston, E. & W. T. R. Co.* v. *U. S.*, 234 U. S. 342.

The power of the courts over Interstate Commerce against undue burdens or discrimination, however, is limited, it would seem, by a provision found in the Federal Motor Carrier Act as follows:

"Sec. 316(e) .... Provided, however, that noth-

ing in this chapter, shall empower the commission to prescribe, or in any manner regulate, the rates, fares, or charges for intrastate transportation, or for any service connected therewith for the purpose of removing discrimination against interstate commerce or for any other purpose whatever."

There is no contention in this case that the Railroad Commission has acted unduly or discriminatorily against petitioner or has denied him the right to use all the highways of Texas, as the denial was applicable to the particuar highways mentioned in his application. There, no doubt, were other highways in the state that the Railroad Commission could not deny him the use of because conditions of such highways might be different. (See R. 32). The evidence in this case shows the commission was willing to grant him authority over any of the state highways where highway and traffic conditions would permit. This was shown by Respondents answer which is a part of the record evidence in this case. (See R. 32).

ARGUMENT CONTINUED

POINT VIII

If the State Motor Carrier Laws are not superseded as to the state's right to exercise its police power applicable to highway use and traffic regulation as contended in this brief, then the use of the words, "bona fide

operation" in sections 309 and 306 of the Federal Motor Carrier Act must be given a meaning consistent with the general purposes of the Act.

The above proposition needs no citation of authorities as clearly where words are used in an act capable of different constructions the construction in accord with the intent of the act whether expressed or implied for failure to make expression must be adopted. In the case of *Burnet, Commissioner of Internal Revenue* v. *Chicago Portrait Co.*, 285 U. S. 1, this court in construing the meaning of the words "foreign country" as used in the Revenue Act of 1921 used language as follows:

> "The term 'foreign country' is not a technical or artificial one, and the sense in which it is used in a statute must be determined by reference to the purpose of the particular legislation."

In the case of *Porto Rico Ry. Co.* v. *Mor.*, 253 U. S. 345, this court said:

> "If the application of the clause were doubtful, we should so construe the provision as to effectuate the general purpose of Congress."

Again the failure of Congress to specifically legislate as to highway use and conservation and regulation as to traffic congestion on such highways must be construed as intent of Congress that the words "bona fide operation" as used would not raise the constitutional question as to the Federal Govern-

ment's power to assume control of such police powers of the state, but that such words would be construed so as to avoid such constitutional question. See *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204 where this court quotes from its former opinion in the case of *U. S.* v. *Delaware & Hudson Co.* 213 U. S. 366 as follows:

> "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."

The trial court in the case at bar held the Federal Act had superseded the state statutes so far as the state act gave the Railroad Commission authority to forbid interstate carriers to use the highways. (R. 37). Also, the phrase, "if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935" as used in the Federal Act, meant actual, physical, continuous and regular operation of such carrier on June 1, 1935 and continuously ever since and as a matter of law that petitioner was in bona fide operation on and prior to June 1, 1935 and since. (R. 37 & 38). Clearly this holding was error from what has heretofore been said and the circuit court properly reversed the case.

Our position is that the term "bona fide operation" so far as applied to Texas highways could mean nothing more than "lawful operations," and since

this point has been further developed in our argument under Point IV we will not discuss it further.

This court has jurisdiction in this case to judicially determine the meaning of the words, "bona fide operation" as used in the Federal Motor Carrier Act. See: *Texas & Pacific Ry. Co.* v. *Gulf Colo. & Santa Fe Ry Co.*, 70 Law Ed. 578; Great Northern *Ry. Co.* v. *Merchants Elevator*, 66 Law (Ed.) 943, 259 U. S. 284; *Atchison T. & S. Ry. Co.* v. *U. S.*, 98 Fed. (2d) 457.

WHEREFORE Respondents pray judgment of this court affirming the judgment as rendered in this case by the United States Circuit Court of Appeals, Fifth Circuit.

Most respectfully submitted,

WILLIAM MCCRAW,
Attorney General of Texas

ALBERT G. WALKER,
Assistant Attorney General

Attorneys for Respondents.

APPENDIX

Part of Texas Motor Carrier Laws (Art. 911B Vernon's Ann. Civil Statutes of Texas, being chapter 277, Acts of 1931, 42nd Legislature) as follows:

Section 4 (d) The Commission is further authorized and empowered, and it shall be its duty, to supervise and regulate motor carriers in all matters whether specifically mentioned herein or not so as to carefully preserve, foster and regulate transportation and to relieve the existing and all future undue burdens on the highways arising by reason of the use of the highways by motor carriers, adjusting and administering its regulations in the interests of the public.

The Commission, in prescribing and adopting rules and regulations and in forming its conclusions and in prescribing its orders, shall invite the Highway Commission's opinion on the condition of the public highways involved and the ability of said highways to carry the existing and proposed additional traffic, and the Commission shall give due and proper consideration to the orders, regulations, ordinances or recommendations of the Highway Commission of Texas; provided, however, nothing herein contained shall be deemed to restrict the powers of the Highway Commission under existing laws. The Commission shall also give due and proper consideration to the recommendations of the commissioners courts of the several counties and to the recommendations of the local government of any mu-

nicipality through or between which motor carriers operate.

Section 16 (a), (b) and (c) (shown in Vernon's Annotated Penal Code of Texas as Article 1690b):

"(a) Every officer, agent, servant or employee of any corporation and every other person who violates or fails to comply with or procures, aids or abets in the violation of any provision of this Act or who violates or fails to obey, observe or comply with any lawful order, decision, rule or regulation, direction, demand, or requirement of the Commission shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than Twenty-five Dollars ($25.00), nor more than Two Hundred Dollars ($200.00), and the violations occurring on each day shall each constitute a separate offense."

"(b) Every officer, agent, servant or employee of any corporation and every other person who violates or fails to comply with or procures, aids or abets in the violation of any provision of this Act or who violates or fails to obey, observe or comply with any lawful order, decision, rule or regulation, direction, demand or requirement of the Commission shall in addition be subject to and shall pay a penalty not exceeding One Hundred Dollars ($100.00), for each and every day of such violation. Such penalty shall be recovered in any Court of competent jurisdiction in the county in which the violation occurs. Suit for such penalty or penalties shall be instituted and conducted by the Attorney General of the State of Texas, or by the County or District

Attorney in the county in which the violation occurs, in the name of the State of Texas."

"(c) Upon the violation of any provision of this Act, or upon the violation of any rule, regulation, order or decree of the Commission promulgated under the terms of this Act, any District Court of any county where such violation occurs shall have the power to restrain and enjoin the person, firm or corporation so offending from further violating the provisions of this Act or from further violating any of the rules, regulations, orders and decrees of the Commission. Such injunctive relief may be granted upon the application of the Commission, the Attorney General or any District or County Attorney. No bond shall be required when such injunctive relief is sought upon the application of the Commission, Attorney General or any District or County Attorney. Such relief may be granted in suits for penalties as provided in subdivision (b) of this Section, but a suit for penalty shall not be a condition precedent to the injunctive relief provided by this subdivision."

Section 22(b) Declaration of Policy—The business of operating as a motor carrier of property for hire along the highways of this State is declared to be a business affected with the public interest. The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks are not effectively regulated, have increased the dangers and hazards on public highways and make it imperative that more stringent regulations should be employed, to the end that the highways may be rendered safer for the use of the general public; that the wear of

such highways may be reduced; that discrimination in rates charged may be eliminated; that congestion of traffic on the highways may be minimized; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the necessity of the general public, and that the various transportation agencies of the State may be adjusted and correlated so that public highways may serve the best interest of the general public.

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CHARLES ELMORE CROPLEY
CLERK

No. 55

In the Supreme Court of the United States

OCTOBER TERM, 1938

A. E. McDONALD, PETITIONER

v.

ERNEST O. THOMPSON, ET AL., RESPONDENTS

APPLICATION FOR LEAVE TO FILE BRIEF, AND BRIEF OF INTERSTATE COMMERCE COMMISSION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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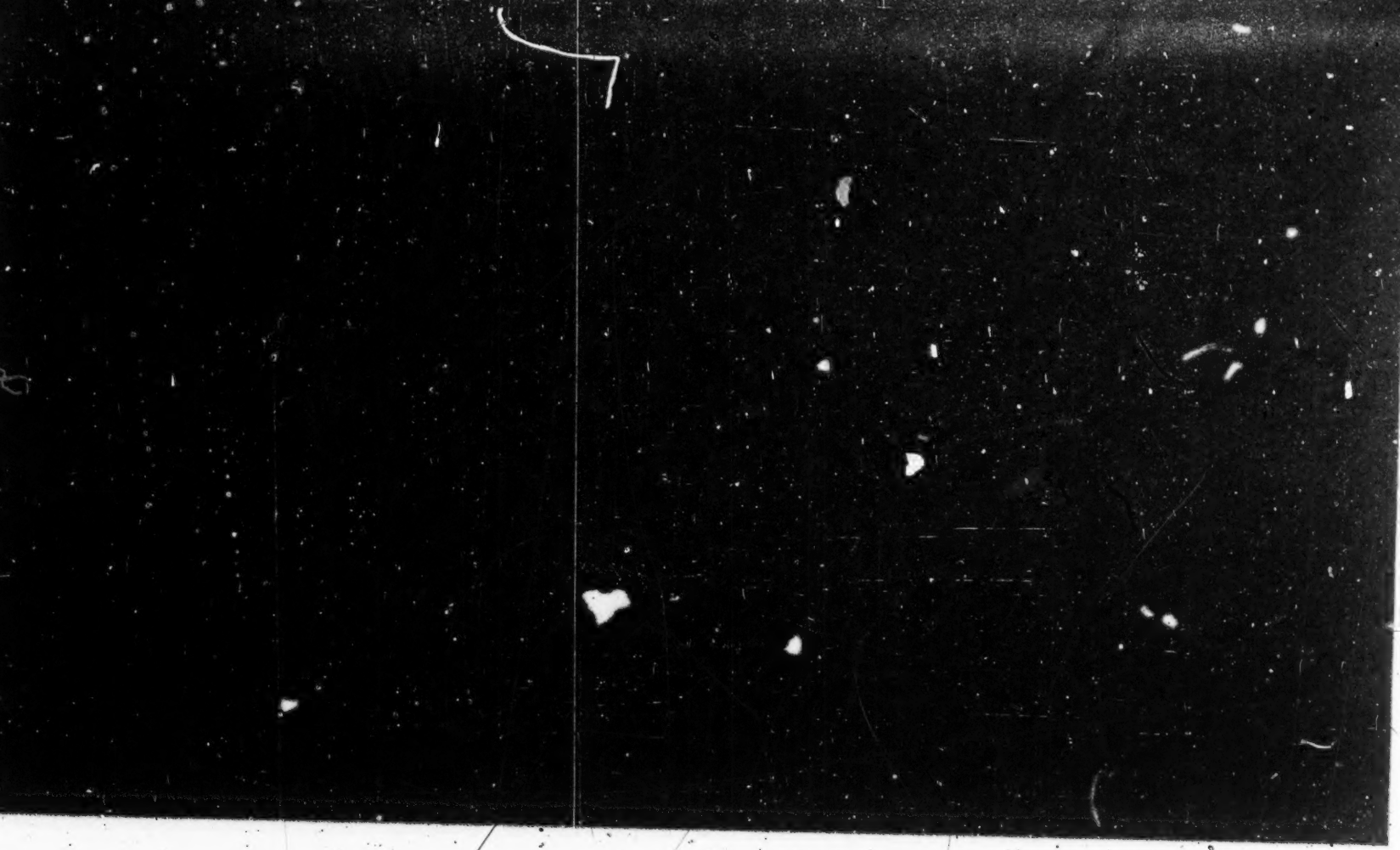

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 55

A. E. MCDONALD, PETITIONER

v.

ERNEST O. THOMPSON, ET AL., RESPONDENTS

APPLICATION FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Comes now the Interstate Commerce Commission (hereinafter called the Commission) and, by its Chief Counsel, respectfully requests leave of the Court to file brief in support of the petition for certiorari, heretofore filed herein. The interest of the Commission in having this Court review the decision with respect to which the petition is made and its suggestions as to some of the important considerations involved in that decision are set forth in the brief hereto attached.

DANIEL W. KNOWLTON,
Chief Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 55

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ERNEST O. THOMPSON, ET AL., RESPONDENTS

BRIEF OF INTERSTATE COMMERCE COMMISSION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT

The Commission respectfully submits this brief in support of the petition for writ of certiorari herein.

The decision of the Circuit Court of Appeals for the Fifth Circuit, dated April 12, 1938, review of which is sought by this petition, is reported in 95 F. (2d) 937, under the title of *Thompson et al.* v. *McDonald*. By this decision, the Circuit Court of Appeals reversed the action of the District Court in issuing an injunction against Thompson and others enjoining them from interfering with petitioner's business of transporting freight by motor vehicle in interstate commerce. In so doing we feel

that the Circuit Court of Appeals construed the Motor Carrier Act of 1935, imposing important duties upon the Interstate Commerce Commission, in such a manner as to seriously interfere with and impede performance by the Commission of its duties under this Act, especially if followed by other lower courts. It is thought that a decision by the Court at this time will serve as a guide-post to the Commission and to lower courts.

FACTS

The pertinent facts are:

Petitioner had been regularly operating in interstate commerce by motor vehicle, and for many years prior to June 1, 1935, and at all times since that date, he was, and is now, engaged in the business of transporting property through and between the States of Texas and Oklahoma and between intervening points situated in other states. Respondents, E. O. Thompson, C. V. Terrell, and Lon A. Smith, constitute the Railroad Commission of Texas, and W. D. Hood, W. B. Renfro, and Tom Miller, are employees of the Railroad Commission engaged in the enforcement of laws of that state. In the conduct of such transportation petitioner had used within the State of Texas federal highways Nos. 75, 77, 80, 81, 90, 281, and 290, which are federal-aided highways.

On January 16, 1936, after the Motor Carrier Act of 1935 had become effective, petitioner, as the operator of a common-carrier truck line, had a

truck loaded with interstate freight stopped by respondents at or near Conroe, Texas, and the driver of the truck was arrested and thrown into jail because he did not hold a state interstate certificate of convenience and necessity, pursuant to a law of the State legislature passed in 1931, which provides in part as follows:

> SECTION 3. No motor carrier shall, after this Act goes into effect, operate as a common carrier without first having obtained from the Commission, under the provisions of this Act, a certificate of convenience and necessity pursuant to a finding to the effect that the public convenience and necessity require such operation.

In addition to the arrest of this particular driver, respondents had issued orders to all inspectors of the State Commission to arrest all of petitioner's drivers and to stop his operations.

Alleging the foregoing and other facts, petitioner applied to the District Court for injunctive relief, and in this connection stated in his complaint that he had complied with all applicable laws of the State of Texas, including meeting the requirements for the issuance to him by the state of license tags, etc., and with all other police requirements of that state. The petitioner alleged that by the Motor Carrier Act of 1935, the sole and exclusive power to regulate interstate commerce was vested in the Interstate Commerce Commission and that under the provisions of said Act he had

applied to the Commission for a certificate of public convenience and necessity to so operate. He further alleged that he would be entitled to receive such a certificate as a matter of right under what is known as the Grandfather Clause, Section 206 of said Act, in that petitioner was in "bona fide" operation on June 1, 1935.

The District Court sustained petitioner's contention; this decision was reversed by the Circuit Court of Appeals for the Fifth Circuit and in its decision construing the Federal law, that Court said, referring to the Motor Carrier Act of 1935:

> Moreover, said Act does not provide that every person who shall receive a certificate of public convenience and necessity *shall be entitled to the use of the various highways of the state,* but the said Act prohibits anyone engaging in interstate commerce until he receives such certificate from the Interstate Commerce Commission. The Interstate Commerce Commission under the Act has the power and exclusive authority to pass upon such applications and to refuse them. If it should refuse one, then such applicant would not be permitted to engage in interstate commerce. This is made clear by the Act. That provision, however, is not in direct conflict with the provisions of the Motor Truck Laws of the State of Texas which require the Railroad Commission of the State of Texas to determine whether or not the preservation of its highways and the safety of the traveling public will be en-

dangered if there is an excessive amount of traffic on the highways. *The determination of that question has been left to the states.* [Italics ours.]

The questions presented by this case and upon which review is sought, may be summarized as follows:

1. Is the regulation of interstate commerce by carriers using the highways of a state a joint regulation by the state and by the Federal Government so far as certificates of public convenience and necessity are concerned?

2. Did not the Motor Carrier Act of 1935 supersede the Texas Motor Truck Law of 1931 in respect of the granting of certificates of convenience and necessity?

ARGUMENT

I

The Motor Carrier Act, 1935, occupies the field of regulation of interstate commerce by motor carriers and excludes state power of regulation in the matter of certificates of public convenience and necessity in interstate commerce

By the Motor Carrier Act, 1935, Congress entered for the first time upon the field of regulation of motor carriers operating in interstate commerce upon the highways of the nation. That it intended to adopt at one time a comprehensive regulatory system for such carriers is evident from an examination of the Act. Specific jurisdiction is given

the Commission in the matter of rates, as to reasonableness and equality of treatment, and as to the establishment of joint rates and divisions thereof between participating carriers; over issuance of certificates and permits authorizing operations in interstate commerce; over the making of reports, the keeping of uniform accounts and records, over mergers and consolidations, adequacy of service, qualifications and hours of service of employees and safety of operations.

It is not surprising that the entry at one time by the national government into the regulation of a class of interstate commerce long left to the permissive control of the several states should provoke consideration as to the efficacy and desirability of national and uniform control as opposed to a local and varying regulation. The legal principles, however, arising out of such an occupation by the national government of its appropriate sphere are settled.

As stated in *Missouri, Kansas & Texas Ry. Co.* v. *Harris,* 234 U. S. 412,

> It is of course settled that when Congress has exerted its paramount legislative authority over a particular subject of interstate commerce, state laws upon the same subject matter are superseded. (P. 417.)

Again, in *Chi., R. I. & P. Ry.* v. *Hardwick Elevator Co.,* 226 U. S. 246, in a case considering the validity of the Minnesota reciprocal demurrage law in the light of the Interstate Commerce Act dealing gen-

erally with the subject of delivery of cars, this Court said:

> As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the State had a right to exert its authority in the absence of legislation by Congress, it must follow in consequence of the action of Congress to which we have referred that the power of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where from the particular nature of certain subjects the State may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted covers the whole field and renders the State impotent to deal with a subject over which it had no inherent but only permissive power. (P. 435.)

That the entry of the national government into the field of regulation of interstate commerce will

exclude state power thereover, as to all matters coming within the general purposes of the federal legislation is made clear in a number of decisions of the Court.

In *N. Y. Cent. R. R. Co.* v. *Winfield,* 244 U. S. 147, a New York workmen's compensation act was held inapplicable to railroad employees engaged in interstate commerce, because of the Federal Employer's Liability Act. The federal act purported only to change the rules of liability in negligence cases, while the New York act provided for liability regardless of negligence. It was argued that both acts might stand, as they covered different fields. This the court denied, saying:

> * * * If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose.

In *Kansas City So. Ry.* v. *Van Zant,* 260 U. S. 459, the Hepburn Act of 1906, prohibiting free railroad passes for interstate journeys, except to a limited class of persons, was held to nullify all state laws pertaining to liability for injuries sustained by persons while using such passes. Thereafter liability in such cases is determined by Federal

law, although the free pass law made no reference to liability.

Prior to 1910, the liability of telegraph companies for negligence in sending or delivering messages was determined by local law, fixed in many states by statutes. The Mann-Elkins Act of 1910, brought telegraph companies under the general provisions of the Interstate Commerce Act relating to uniformity of rates and equality of service. No provision in the act pertained to liability for negligence, but the Supreme Court held that in view of the general purposes of the act, state laws covering liability were invalid from the time of the entry of the National Government into the field of regulation. It said:

> We think it clear that the act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the act to regulate commerce to establish, a purpose which would be wholly destroyed if, as held by the court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subject to the control of divergent and it may be conflicting local laws.

Postal Tel. Co. v. *Warren-Godwin L. Co.*, 251 U. S. 27.

To the same effect is *Western Union Tel. Co.* v. *Boegli*, 251 U. S. 315, where the court said:

> The proposition that the act of 1910 must be narrowly construed so as to preserve the reserved powers of the state over the subject in hand, although it is admitted that that power is in its nature federal and may be exercised by the state only because of non-action by Congress, is obviously too conflicting and unsound to require further notice. We therefore consider the statute in the light of its text and, if there be ambiguity, of its context, in order to give effect to the intent of Congress as manifested in its enactment.
>
> As the result of doing so, we are of the opinion that the provisions of the statute bringing telegraph companies under the Act * * * so clearly establish the purpose of Congress to subject such companies to a uniform national rule as to cause it to be certain that there was no room thereafter for the exercise by the several states of power to regulate, by penalizing the negligent failure to deliver promptly, an interstate telegram * * *.

In the present case, the purposes of Congress have not been left to surmise but have been expressed in the Act under a section (202) entitled "Declaration of Policy and Delegation of Jurisdiction." The aim to establish a national highway system with central regulatory control, as opposed to a series of state wide systems is evident in the declared purpose "to develop and preserve a high-

way transportation system properly adapted to the needs of the commerce of the United States and of the national defense."

It is further declared to be the purpose of Congress in Section 202 (a) "to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation."

The ability of the motor carrier to operate, without shifting of load, from the premises of the shipper to the premises of the consignee has to date constituted its primary advantage. By this means it has given a service not hitherto rendered by other carriers. In saving in cost of expensive packing and crating, and elimination of supplementary pick up and delivery service, it has been able to render an economical and efficient service. Local variations in laws and regulations, however commendable their purposes, will have the necessary effect of destroying the advantages of motor transportation which it is the declared purpose of Congress to protect.

A degree of uniformity in state regulations, may of course be obtained by voluntary action of the several states. But the recognition of state power in these matters necessarily recognizes a considerable range of legislative discretion. And variations in state purposes and policies will be sufficient to substantially obstruct the development of a na-

tional highway system of transportation which the national act seeks to build up.

It is apparent that state power of control, even in a negative manner, that is, by denying a certificate, in the matter of certificates of public convenience and necessity for operations in interstate commerce, is in direct conflict with the expressed purposes of the Motor Carrier Act, and will serve to render difficult of attainment specific results which the Commission is directed to obtain.

The foregoing is not to argue that complete uniformity in all matters may be attained at once on a national scale. Nor is it to argue that local needs in the matter of safety of operation and preservation of the highways may be ignored. The Motor Carrier Act, in its provisions for administration by joint boards composed of state authorities, is ample provision for the protection of such local interests. The purpose of Congress to approach uniformity in operations and equality of treatment of the public without regard to state lines, by means of a centralized regulatory authority rather than by appeal to voluntary state action is manifest throughout the act. In all these matters there is necessarily involved and implied a national control of the factors necessary to bring about the results aimed at.

Further than this, in Section 202 (c) of the Motor Carrier Act, Congress undertook to name the powers previously exercised by the states which it

did not desire to touch. The powers of taxation and regulation of intrastate commerce are there expressly reserved for state control. If other matters, including state certificates to operate in interstate commerce, were intended to be reserved for the states, this section was the natural place to so declare.

It seems apparent, therefore, that under the Commerce Clause, the authority of the Interstate Commerce Commission is paramount to any exercise by a State over interstate commerce, especially in a matter as closely related thereto as certificates of public convenience and necessity to operate in interstate commerce. Otherwise, the anomalous situation would prevail of the State possessing a veto authority over matters granted to the Federal Government under the Constitution. It is well settled, however, by your decisions that "there can be no divided authority over interstate commerce." To escape this conclusion, the lower court appears to rest its decision upon the ground that there is no conflict as between the federal and the state laws because the regulations of the State Commission and the operations of state laws go more to safety of the public on the highways, a matter peculiarly within the control of the state. Whatever the underlying grounds, the fact remains that there is a conflict between the Federal and the State Governments on the same subject matter, because it lies within the authority of Texas, in this

case, to nullify any grant of authority given by the Interstate Commerce Commission. And, of course, if Texas has the authority to so nullify, it must be conceded that other states under similar laws could be given similar authority. When we consider the number of motor vehicle operators with vehicles running into two or more states, the possible consequences of such a holding become painfully apparent. Such a holding would make the efficacy of the Federal act rest upon the mere permission of the State. That such is not the law is clear from this Court's decision in *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 612–613, where you said:

> The federal and the state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the Commission has power to prescribe an automatic fire-box door and a cab curtain, it has done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection

> Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose. * * *

While an argument to the contrary could well be made, it may be conceded that before the enactment of the Motor Carrier Act of 1935, the Texas law of 1931 requiring a state certificate of public convenience and necessity before interstate operations could be conducted in that state might be a valid enactment. But it seems clear to us that upon the occupancy of the field by the National Government, conflicting state laws and regulations had to give way. And while the lower court contends there is no conflict, it must be conceded, as a matter of substance, that the Federal act becomes operative, not by its own terms, but by permission of the State.

If certiorari is not granted, the courts of the Fifth Circuit will be bound by the decision under review, and it is likely that the denial of this writ will influence courts in other circuits having similar problems.

This case presents considerations which have a vital bearing upon the future course of action of the Commission as to the extent of its powers to grant certificates of public convenience and neces-

sity under the Motor Carrier Act, and it is of importance in the proper administration of the duties imposed upon it that its power and authority should be defined by this Court, in the respect that it is involved in this case.

Respectfully submitted.

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OCTOBER 1938.

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IN THE

Supreme Court of the United States

October Term, 1938.

No. 55.

A. E. McDONALD, *Petitioner*,

v.

ERNEST O. THOMPSON, ET AL.

BRIEF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW.

JOHN E. BENTON,
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November 7, 1938.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS AS AMICUS CURIAE.

PRELIMINARY STATEMENT.

The National Association of Railroad and Utilities Commissioners is a voluntary Association embracing within its membership the members of the regulatory commissions and boards of the several states of the United States, except Delaware, which has no state regulatory commission, and New York, the commissions of which are not at present actively identified with the Association.

By the constitution of the Association, the President of the Association and the Executive Committee, or either of

them, may direct the General Solicitor to appear on behalf of the Association (as distinguished from the particular commissions represented in its membership) in any proceeding pending before any court or commission in which, in the judgment of such President or Committee, appearance on behalf of the Association should be made. This brief, by leave of court, is filed on behalf of said Association, in the general public interest, by direction of the President and of the Chairman of the Executive Committee of said Association.

STATEMENT OF THE CASE.

The petitioner in 1934 applied to the Railroad Commission of Texas for a certificate granting authority to operate in interstate commerce over a certain specified route in Texas. After a full hearing this application was denied on July 14, 1934. From this denial the petitioner appealed to the State District Court. That Court entered a judgment in favor of the petitioner and granted an injunction restraining the Railroad Commission from interfering with the operations of the petitioner. The Railroad Commission thereupon appealed to the Court of Civil Appeals of Texas. That Court on January 8, 1936, reversed the District Court, sustained the order of the Commission, and ordered the injunction dissolved. That judgment became final.

The facts found by the Commission, and the grounds upon which it refused to grant a certificate to the petitioner were summarily stated by the Court of Civil Appeals as follows:

> "The order of the commission denying the permit found numerous facts as to the use of the highways generally by trucks, including several of the highways on which McDonald proposed to operate in and about designated cities, the injuries such operations would inflict upon portions of such highways, the dangers to the traveling public thereon occasioned by such operations, and refused the permit, obviously on the ground

that, as to at least portions of the highways sought to be used, such operation would place an undue burden upon the physical properties of the highways themselves, would endanger public safety, and would interfere with the use thereof by the public." (90 Southwestern 2d 581.)

Following this decision, the petitioner thereafter operated without a permit in Texas, claiming that the Motor Carrier Act of 1935 had operated to vest exclusive jurisdiction and authority in the Interstate Commerce Commission to regulate interstate motor carriers, and that the Railroad Commission of Texas, after the enactment of that statute was without jurisdiction as to their operation. This action was brought in the District Court of the United States for the Northern District of Texas to restrain the respondents, who constitute the Railroad Commission of Texas, and other law enforcement officers from interfering with the petitioner or his employees while engaged in the interstate operation of trucks within the State of Texas.

The respondents in their answer aver that the highways over which the petitioner sought to operate are not in such a condition as to justify the issuance of any permit to him, and that said highways are now so congested that his operation would unreasonably interfere with the use thereof by the traveling public. The respondents further aver in their answer, in substance, that said Railroad Commission claims jurisdiction to determine whether or not the highways over which any motor carrier operation is proposed to be carried on in Texas are of such construction, or the traffic thereon is in such congested condition that the proposed operation would unreasonably interfere with the use of the highways by the traveling public; and averred that it would exercise such jurisdiction upon application by the petitioner for a certificate to transport property for hire in interstate commerce. The respondents further aver, however, that upon such application they would not require the petitioner to prove that

public convenience and necessity requires the proposed service, nor would the Commission consider the adequacy of existing transportation facilities, nor the effect of the proposed operation upon other transportation facilities.

The District Court was of the opinion that the Motor Carrier Act of 1935 had superseded Texas law in so far as such law gave to the Railroad Commission power to forbid use of the highways for trucks engaged exclusively in interstate commerce. It accordingly granted the injunction prayed for. Upon appeal this injunction was set aside by the Court of Appeals for the Fifth Circuit.

Considering the provisions of the Texas statute, as construed in certain cases, the Court of Appeals said:

> "It is plain, therefore, that the Legislature of Texas undertook to vest in the Railroad Commission full jurisdiction over the public highways of the state of Texas, and imposed the duty upon it to protect and preserve the highways of the state and to secure the safety of the traveling public thereon. Appellee, as above stated, contends that this authority is vested exclusively in the Interstate Commerce Commission by the Motor Carrier Act of 1935, 49 U. S. C. A. 301 seq.
>
> "The Legislature, in the exercise of its police powers, has the authority to preserve its highways and protect the safety of the traveling public so long as its acts are not in direct conflict with an act of Congress regulating interstate commerce over highways. * * * The subject of protection of the highways in so far as they may be used for interstate commerce does not require uniformity of action, and, as a matter of fact, there is no uniformity of action by the various states at this time. The Interstate Commerce Commission has jurisdiction over the commercial considerations appertaining to the interstate truck business, but the preservation and safety of the roads themselves has been left with the state commissions. * * * The Interstate Commerce Commission under the act has the power and exclusive authority to pass upon such applications and to refuse them. If it should refuse one,

then such applicant would not be permitted to engage in interstate commerce. This is made clear by the act. That provision, however, is not in direct conflict with the provisions of the motor truck laws of the state of Texas which require the Railroad Commission of the state of Texas to determine whether or not the preservation of its highways and the safety of the traveling public will be endangered if there is an excessive amount of traffic on the highways. The determination of that question has been left to the States." (95 Fed. (2d) 942-943)

The question presented now to the Court is this:

Did the Motor Carrier Act of 1935 operate to supersede the provisions of the Texas statute which make it the duty of the Railroad Commission of Texas to regulate and supervise the operations of motor carriers upon the highways so as to preserve the highways themselves from unreasonable destruction and to keep the same reasonably safe for public use.

ARGUMENT.

Prior to the enactment of the Motor Carrier Act of 1935 a case similar to this case was before this Court in *Bradley* v. *Public Utilities Commission*, 289 U. S. 92. In that case the Ohio Commission had denied a certificate of convenience and necessity to a carrier desiring to operate in interstate commerce, because, as the state commission found, the route was "so badly congested by established motor vehicle operations that the addition of the applicants' proposed service would create and maintain an excessive and undue hazard to the safety and security of the traveling public and the property upon such highway."

Distinguishing that case from *Buck* v. *Kuykendall*, 267 U. S. 307, and other cases where state commission orders refusing certificates were held ineffective to prevent operation in interstate commerce, the Court said:

"But there promotion of safety was merely an incident of the denial. Its purpose was to prevent competion deemed undesirable. The test employed was the adequacy of existing transportation facilities; and since the transportation in question was interstate, denial of the certificate invaded the province of Congress. In the case at bar, the purpose of the denial was to promote safety; and the test employed was congestion of the highway. The effect of the denial upon interstate commerce was merely an incident.

"Protection against accidents, as against crime, presents ordinarily a local problem. Regulations to insure safety is an exercise of the police power. It is primarily a State function, whether the locus be private property or the public highways. Congress has not dealt with the subject. * * * The Commerce Clause is not violated by denial of the certificate to the appellant, if upon adequate evidence denial is deemed necessary to promote the public safety." (289 U. S. 95).

Another recent decision of this Court dealing with this very Texas statute was *Sproles* v. *Binford,* 286 U. S. 374, 388. In that case this Court declared:

"The limitation, by Section 5, of the net load on trucks to 7,000 pounds is attacked as an arbitrary regulation depriving appellants of their property without due process of law. * * * In exercising its authority over its highways the State is not limited to the raising of revenue for maintenance and reconstruction, or to regulations as to the manner in which vehicles shall be operated, but the State may also prevent the wear and hazards due to excessive size of vehicles and weight of load." (286 U. S. 388).

Again in *Stephenson* v. *Binford,* 287 U. S. 251, the Court upheld the right of the State of Texas to regulate the charges of contract carriers for the purpose, among others, of lessening traffic upon the highways and rendering them more safe.

These cases would appear conclusively to sustain the judgment below, unless the effect of the Motor Carrier Act

of 1935 was to vest power to regulate, for the purpose of preserving the highways and the safety of the public traveling thereon, exclusively in the Interstate Commerce Commission.

We question the constitutional power of Congress to disable the states to protect their highways, and to adopt reasonable regulations governing the use thereof, for the protection of the public traveling thereon; but Congress did not attempt any such disablement in the Motor Carrier Act, 1935. The purpose of Congress, on the contrary, to preserve the proper authority of the States was made manifest. In Section 202(a) it was declared to be the policy of Congress to "cooperate with the several States and the duly authorized officials thereof" in the administration of the statute. Section 205(b) requires the Commission to refer most cases in which not more than 3 States are involved to joint boards, composed of nominees of State commissions. Section 216(e) expressly forbids the Interstate Commerce Commission to prescribe intrastate rates for any purpose whatever, while Section 202(c) declares that nothing in the Act shall be construed to "interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

These several provisions are significant as bearing upon the question now under consideration because they evidence the solicitude exercised by Congress to preserve State powers, and to enable State commissions to have a part in the administration of the Federal statute. While Congress was thus carefully preserving state powers by expressly withholding from the Interstate Commerce Commission power, which, as to rail carriers, it had before vested in that Commission, it will not be supposed that it can have designed the latter destruction of the police power of the states to preserve and keep safe their highways, unless such intent was made evident by very clear language.

Decisions of this Court made before the enactment of the Motor Carrier Act of 1935 had emphasized the impor-

tance of this power of the states. In *Erie Railroad Co.* v. *Board of Public Utility Commissioners*, 254 U. S. 394, 410, speaking through Mr. Justice Holmes, the Court, in upholding an order of the State commission requiring large expenditures for highway safety, said:

> "Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is, and from which, ultimately the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power * * *".

In *Morris* v. *Duby*, 274 U. S. 135, 143, 144, when a truck owner operating over a federal aided highway contested the legality of a state commission order reducing the permissible weight of truck load from 22,000 pounds to 16,500 pounds, Chief Justice Taft said:

> "An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the state its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. * * *"

We do not question the plenary power of Congress to regulate interstate commerce and the instrumentalities whereby such commerce is moved. Such power, however, when its exercise will result in curtailment of the accustomed powers of the states with relation to their internal affairs, however far reaching the federal power may be, can be exercised only after Congress, acting directly or through some appropriate agency, has found the exercise to be necessary for the protection of that commerce which, by the Constitution, has been committed to the regulation of the federal government.

The intent of Congress must be made clear.

> "In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested." (*Illinois Central R. R.* v. *Public Utilities Commission*, 245 U. S. 493, 510 and cited cases)

As was pointed out by the court below, the Motor Carrier Act of 1935 does not undertake to regulate operation of motor carriers for the purpose of protecting the highways, or of keeping the same safe for public use; and no provision of the Act evidences an intention to negative regulation for these purposes by the states.

Counsel for the Interstate Commerce Commission have filed a brief, in support of the application for certiorari in this case, in which various cases are cited in support of the proposition that when Congress has asserted its paramount legislative authority, over a particular subject of interstate commerce, State laws upon the same subject matter are superseded.

That principle of law, of course, is so well settled as not to be questioned. The argument in the brief, however, is based upon the erroneous assumption that the Federal Motor Carrier Act and the Texas Motor Carrier Act, with respect to certificates of convenience and necessity, respectively cover the same particular subject-matter.

It is true that each statute authorizes the regulatory commission administering the same to issue what are termed certificates of convenience and necessity, but the regulatory purposes which the statute makes it the duty of the regulatory commission to accomplish are much broader under the Texas statute than are those aimed to be accomplished by the federal statute.

The federal statute, in Section 203(a), specifies the findings which the Commission must make as a prerequisite to the granting of a certificate. It must find the applicant "fit, willing and able to perform the service proposed." And it must also find "that the proposed service * * * is or will be required by the present and future convenience and necessity". If those facts are found "a certificate shall be issued". There is thus definitely excluded from the consideration of the Interstate Commerce Commission any question of the effect of the proposed operation upon the preservation of the highways to be used, or upon the safety of the public upon the highways.

The Motor Carrier Law of Texas, on the other hand, contains a declaration of policy in Section 22(b) in part as follows:

> "The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks are not effectively regulated, have increased the dangers and hazards on public highways and make it imperative that more stringent regulation should be employed, to the end that the highways may be rendered safer for the use of the general public; that the wear of such highways may be reduced; * * * and that the various transportation agencies of the State may be adjusted and correlated so that public highways may serve the best interest of the general public."

Section 4(d) of the Act provides:

> "(d) The Commission is further authorized and empowered, and it shall be its duty, to supervise and regulate motor carriers in all matters whether specifically mentioned herein or not so as to carefully preserve, foster and regulate transportation and to relieve the existing and all future undue burdens on the highways arising by reason of the use of the highways by motor carriers, adjusting and administering its regulations in the interests of the public."

This Court has heretofore held that notwithstanding the rule laid down in *Buck* v. *Kuykendall*, 267 U. S. 307, a state

may require an interstate carrier to obtain a certificate denominated a "certificate of convenience and necessity," for the accomplishment of a purpose of regulation within the power of the State, if no attempt is made to extend the exercise of State power to matters which have been held beyond the reach of such power. (*Clark* v. *Poor*, 274 U. S. 554) The right of a state to require insurance, taken out for the protection of others than passengers, from an operator of a bus engaged exclusively in interstate commerce, was recognized in *Sprout* v. *South Bend*, 277 U. S. 163, 172.

Cases such as those cited upon the Interstate Commerce Commission brief, dealing with railroads and other public utilities which operate on private rights of way, have little relevancy to the question now under discussion, for the reason that those cases did not involve the right of a state to preserve property of the State so vitally necessary to the continuance of civilized existence as are the highways of a state, and the right to preserve also the lives of its people, who are continually compelled to make use of those highways. If any police power of the state is indestructible by Congress such power must be.

It would not be questioned that a state may restrict the speed of motor vehicles upon its highways, and compel the observance of traffic regulations which may be established for the control of traffic in towns and cities. Engagement in interstate commerce can not free operators of motor vehicles from the obligation to conform to the laws of a state in these respects, while operating within the state; and regulation by the Federal Government of the entry of motor carriers into the business of supplying interstate transportation service can not have the effect of nullifying state laws which govern the use of the highways. For example, if a state or municipality has constructed a parkway and restricted its use to passenger vehicles, a motor truck operator may not drive his truck upon that parkway merely because he holds a certificate of convenience and necessity from the Interstate Commerce Commision: also, if he vio-

lates the speed law of the state, he may be arrested and punished under the state law, notwithstanding his certificate.

This case is the same in principle as *South Carolina Highway Commission* v. *Barnwell Brothers*, decided at the last term of this Court. This case, like that case, involves the right of a state to impose regulations upon interstate carriers designed to preserve the highways of the State from destruction. That case involved both regulations as to weight of vehicles, designed to preserve the highways, and as to size, designed to preserve safety of travelers upon the highway other than operators or passengers in the vehicles affected. Counsel for the carrier in that case, and counsel for the Interstate Commerce Commission as well, made substantially the same arguments as to the asserted necessity for uniformity in regulations as to all interstate carriers in all the states as are made in this case. The Court, however, sustained the state regulations saying:

> "Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulation of which is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse." (Advance Opinions, U. S. Supreme Court, L. Ed., Vol. 82, pages 469, 474.)

To the effect that partial occupation of the regulatory field by the federal government through the promulgation of safety regulations does not inhibit state action in the field not occupied, see *Kelly* v. *Washington*, 302 U. S. 1.

In view of the complete absence from the Motor Carrier Act of 1935 of any language granting to the Interstate Commerce Commission jurisdiction to exercise regulatory power for the purpose of preserving public highways and the safety and convenience of their use by the public generally, and the like absence of any provision therein expressing the purpose of Congress to inhibit the continued exercise by the states of regulatory power for that purpose, we contend that there is no ambiguity in the statute in this respect, and that it was the clear purpose of Congress to leave state power in this field unaffected. If, however, an opposite construction of the statute be possible, it is certainly not free from doubt; and the constitutional question presented by such opposite construction would be of such serious character as to lead the court to refrain from adopting such construction.

> "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States* v. *Delaware & H. Co.*, 213 U. S. 366, 407, 408. *State of Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, 217.

Respectfully submitted on behalf of the National Association of Railroad and Utilities Commissioners.

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General Solicitor;

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No. 55

In the Supreme Court of the United States

OCTOBER TERM, 1938

A. E. McDONALD, PETITIONER

v.

ERNEST O. THOMPSON ET AL., RESPONDENTS

BRIEF OF INTERSTATE COMMERCE COMMISSION AS AMICUS CURIA

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Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 55

A. E. McDONALD, PETITIONER

v.

ERNEST O. THOMPSON ET AL., RESPONDENTS

BRIEF OF INTERSTATE COMMERCE COMMISSION AS AMICUS CURIA

DECISIONS OF THE COURT BELOW

On January 17, 1936, the District Judge granted a temporary restraining order (R. 17) which, after hearing, was made permanent on July 17, 1936 (R. 33). On July 15, 1936, the District Judge approved findings of fact and concluded as a matter of law that the Motor Carrier Act of 1935 superseded the state law in so far as the Texas Act required petitioner to secure a certificate of public convenience and necessity from the authorities of Texas before using the highways in that state to transport property exclusively in interstate commerce (R. 37).

The Circuit Court of Appeals for the Fifth Circuit on appeal, reversed the decision of the District Court (R. 159–170) holding in substance that unless there was direct conflict between the Motor Carrier Act and the state law, the state law would not be superseded (R. 168). The Court further held that no such direct conflict existed in this case (R. 169). The decision of the Circuit Court of Appeals is reported in 95 F. (2d) 937. On October 10, 1938, this Court granted petition for writ of certiorari.

STATEMENT OF FACTS

The pertinent facts are quite simply stated. For a long time prior to June 1, 1935, and at all times since that date, petitioner has been continuously and regularly operating in interstate commerce by motor vehicle over the highways of the States of Texas and Oklahoma exclusively in interstate commerce (R. 35). He has not been engaged in transporting property in intrastate commerce, nor does he desire to do so (R. 160). Within the time permitted by the Grandfather Clause of the Motor Carrier Act, Section 206, or within the time applications might be filed under appropriate orders of extension by the Interstate Commerce Commission, petitioner filed an application for an interstate certificate.[1] Section 206 provides, among other things, that "Pending the determination of any

[1] Report and Recommended Order of Joint Board 16 in M. C. 80, 415, for granting application.

such application the continuance of such operation shall be lawful."

Respondents, E. O. Thompson, C. V. Terrell, and Lon A. Smith, constitute the Railroad Commission of Texas, and W. D. Hood, W. B. Renfro, and Tom Miller, are employees of the Railroad Commission engaged in the enforcement of laws of that state. In the conduct of his interstate business, petitioner had used within the State of Texas federal highways Nos. 75, 77, 80, 81, 90, 281, and 290, which are federal-aided highways (R. 2–4).

On January 16, 1936, after the Motor Carrier Act of 1935 had become effective, petitioner, as the operator of a common-carrier truck line, had a truck loaded with interstate freight stopped by respondents at or near Conroe, Texas, and the driver of the truck was arrested and thrown into jail (R. 142) because he did not hold a state interstrate certificate of convenience and necessity, pursuant to a law of the Texas State legislature passed in 1931, which provides in part as follows:

> SECTION 3. No motor carrier shall, after this Act goes into effect, operate as a common carrier without first having obtained from the Commission, under the provisions of this Act, a certificate of convenience and necessity pursuant to a finding to the effect that the public convenience and necessity require such operation.

In addition to the arrest of this particular driver, respondents had issued orders to all inspectors of

the State Commission to arrest all of petitioner's drivers and to stop his operations.

Alleging the foregoing and other facts, petitioner applied to the District Court for relief, and in this connection alleged, and the District Court sustained these allegations by appropriate findings, that he had complied with all applicable laws of the State of Texas, including public liability and property damage insurance approved by the Commission or its representative (R. 36), and that his trucks had all been registered under the requirements of state law; that all of his trucks were in good mechanical repair and condition and could be safely operated over the highways, and that in all respects the police requirements of the state had been met. He further alleged, and the District Court found, that the provisions of the state law, in so far as they gave to the State Commission power to forbid the use of highways by petitioner's trucks, when engaged exclusively in interstate commerce, had been superseded by the Motor Carrier Act of 1935. Another allegation was that petitioner will be entitled to receive from the Interstate Commerce Commission, a certificate of public convenience and necessity as a matter of right under Section 206 of the Motor Carrier Act. As previously shown Section 206 provides that: "Pending the determination of any such application the continuance of such operation shall be lawful." This section has been construed by the U. S. District Court for the

Western District of Pennsylvania in *Thomas* v. *National Delivery Association,* 24 F. Supp. 171. In that case, which was an action for damages to recover the value of plaintiff's household goods demolished in the course of transit, the Court said:

> * * * The defendant filed an application with the Interstate Commerce Commission for a permit to operate as a contract carrier, for a certificate to operate as a common carrier, and for a brokerage license. No action had been taken by the Interstate Commerce Commission prior to its contract with the plaintiff on these applications, but in view of Sections 206 (a) and 209 (a) of the Motor Carrier Act of 1935, 49 U. S. C. A. §§ 306 (a), 309 (a), both types of operation in which the applicant was engaged, might be lawfully continued pending determination by the Commission on the application. Therefore, at the time it contracted with the plaintiff, the defendant might lawfully operate, both as a common carrier, and as a contract carrier. * * * (Id. 172.)

Answers were filed by the state authorities, in which they claimed jurisdiction and power to prohibit the use of the highways of Texas for the transportation of property for hire if such highways are not of proper construction or in proper condition to maintain said traffic, or if the contemplated use of said highways by the complainant will increase dangers and hazards on said highways and congest traffic thereon and unreasonably interfere with the

use thereof by the public (R. 24). In their answer the state authorities further said that—

> should said complainant present to the Commission an application to transport property for hire in interstate commerce over the highways of this State, that said Commission will hear said application; that in said hearing the respondent Commission will require the applicant to show by facts, circumstances, and conditions that the highways proposed to be used by said applicant are capable of withstanding the proposed use without undue injury and damage to the said highways and without unreasonable interference with the use of said highways by the general public for ordinary purposes; that respondent Commission will not require said applicant to prove that public convenience and necessity requires the proposed service and that said Commission will not consider the adequacy of the existing transportation facilities, or the effect the proposed operation will have upon the existing transportation facilities in determining whether or not it will authorize said applicant to operate over the highways of this State, but that said Commission will refuse to issue plates, tags, identification cards, and authority to use said highways until said plaintiff has procured authority from the Interstate Commerce Commission to so operate (R. 32).

Shortly stated this contention is that the power to regulate interstate commerce by motor vehicle

can only become effective, under the Motor Carrier Act of 1935, by a dual exercise of power on the part of the State and National Governments, and that the assent of the National Government can be made nugatory by the failure of the State to give a similar assent for the use of highways to transport interstate commerce within its borders.

ARGUMENT

I

The lower court's decision is basically contrary to long settled principles of the utmost importance both to the States individually and as a Nation

1. The assumption upon which the decision is bottomed, that jurisdiction placed by a state with its Commission to grant or deny authority for operations in interstate commerce over highways within the state, by a common carrier by motor, does not conflict with the Federal Motor Carrier Act, 1935, disregards the fact that the Federal Act sets up a comprehensive system for the regulation of common carriers in interstate commerce by motor vehicle, with provisions as to excepted matters within a state and with express pronouncement of the national purposes to be served which would be obstructed, or altogether defeated, under the decision; disregards the fact that, by that Act, Congress has occupied the field of "authorization" of such operations in interstate commerce, if indeed, in the absence thereof, the individual states ever had the power to stop common carrier operations in interstate commerce at their boundary lines; misconstrues the language of the Act (sec. 206) with respect to such authorizations, and as particularly pertinent to this case, overlooks the language and purpose of the so-called "grandfather clause" of section 206, which, as particularly designed for applications for authority to operate by motor carriers already engaged in the business and, as necessary to avoid interruptions all over the country in the services rendered to the public (often to those wholly dependent thereon) grants to such carriers upon the filing of their applications within the time provided for, the direct statutory authority to continue their interstate operations pending the Commission's determination

The lower court's decision is, in substance, that the so-called Texas Truck Law requires (and

validly so, despite the Commerce Clause and the Motor Carrier Act, 1935, enacted thereunder) that a common carrier by motor vehicle engaged, or proposing to engage exclusively in interstate commerce, must obtain from the State Commission authority for such interstate operations over highways within the state. The Court hinges its decision upon the view, expressed by it, that there is no conflict between such authority, which it conceives that the state has placed with its Commission, and the authority placed by Congress with this Commission by the Motor Carrier Act, 1935 (Secs. 206, 207); this in part for the reason (as given, in substance, by the Court, 95 F. 2d, 937, 943) that the federal act (Sec. 206) does not provide that every person who receives a certificate from this Commission shall be entitled to the use of the highways of the state but instead "prohibits anyone from engaging in interstate commerce until he receives such certificate" from this Commission. From this statement, it seems plain that the lower court has overlooked important language whereby, as to each of the Act's provisions relating to certificates, when the Commission grants such a certificate, it constitutes the "authorizing" (see Secs. 206, 207) of the operations in interstate commerce over the highways between the states, and, accordingly, the Act does not leave open, after such certificate of authority is given to an applicant for operation in interstate commerce, say, through

several states, for any one of those states to "veto" such authority for operations in interstate commerce, given pursuant to Act of Congress under the Commerce Clause and, moreover, perhaps anxiously desired by all other of the states. The second reason given by the lower court for its view that such power in a State Commission to "veto" authority for operations in interstate commerce given pursuant to the federal act would not give rise to conflict, is because (so it is said) that while this Commission "has jurisdiction over the commercial considerations appertaining to the interstate truck business * * * the preservation and safety of the roads themselves has been left with the state commission." The lower court's view that this Commission's jurisdiction as to interstate operations is confined to commercial considerations is by no means correct, since the Act looks to the Commission in many matters of safety, such as liability insurance, hours of service of employees, safety of operation and other things; and, moreover, it should not be forgotten that, as to hazards due to congestion, or narrow highways, the federal government has made its full contribution to the safety of the public in the most effective way possible, that is, by means of the "federal aid" highways, which have both directly improved such conditions on those highways and tended to relieve congestion on others (*Bush* v. *Maloy*, 267 U. S. 317, at p. 324); which latter, too, might be advanced as

far more effective and possible than the Court's intimation (95 F. 2d 937, 943) that the Congress should have provided for a tribunal, or authorized this Commission, to determine the method or rules and regulations by which the public highways of any state shall be maintained and as to how the safety of the travelling public shall be protected against the dangers of an undne amount of traffic, this seeming to imply, when taken together with earlier discussion in the decision, that Congress should have taken jurisdiction to prescribe the rules and regulations governing the amount of purely intrastate commercial vehicles, which, as matter familiar to all, consists on the highway approaches and suburbs of cities and towns, at least in considerable measure, of commercial vehicles of that kind, commonly known as delivery trucks.

Petitioner McDonald's brief several times emphasizes that the decision of the lower court on review here was not an appeal from report of the Texas Commission denying his application made before the Federal Motor Carrier Act was enacted or from the State Court's opinions reviewing the Commission's, but, instead involves review of the decision of the Circuit Court of Appeals Fifth Circuit reversing the decree of the U. S. District Court enjoining officials of the state from interfering with the operations of his vehicles upon findings and conclusions that the federal act had superseded the state act's requirement for authority

from the State Commission for operation as applying, if ever, to operations in interstate commerce. He is entirely right in his statement that the earlier case involved one set of facts as to what was applied for and as to the facts placed in evidence and that the case on review before this Court involved an entirely different issue. It is also true that the lower court's decision on review here devotes considerable discussion to the facts of the earlier case and, while that case can hardly be regarded as entering into the disposition of the matter on review here it is difficult to refrain from mention of certain things which strike one most forcefully upon reading the lower court's discussion of it. 95 F. 2d. 937, 942. The evidence seems to have consisted of testimony of citizens to the effect that truck traffic has caused congestion on the highways leading into the larger centers of population, especially Houston, Galveston, Dallas, and some of the others such as has made them hazardous to citizens using private automobiles. "They would use the highways more except for this condition." Some having business in those cities which retains them late remain there because of the danger of returning home at night. It is no attempt to rebut the testimony in this other case to make comment on its nature and upon what seems strikingly lacking. We have all experienced the conditions on congested highways leading into large centers of population and certainly there are

few who have not been behind trucks, busses, marketing, and store delivery vehicles, and for a period having had to exercise some measure of patience or restraint. As to the danger mentioned, it is not an attempt to rebut, to comment on the fact that so far as appears there are no specific cases cited with development of the particular causes and conditions, but all seem to be generalities which might be expected almost anywhere. But neither the states, nor the country as a whole, are prepared to deny the highways to commercial vehicles, which serve, not alone industries, producers, retailers, small stores and the like, but also consumers, homes and others receiving deliveries of the goods; and this, although citizens who drive, or are driven, in private cars, taxicabs and the like give little thought to the benefits to them of those uses made of the roads for commercial purposes, which more than likely is true of officials or employees of industries and other producers, depending in considerable measure upon trucks for marketing.

Another feature of the evidence discussed by the lower court from the other case above mentioned is that, with respect to the congestion mentioned, it is not shown whether in large measure it may not consist of intrastate commercial common, contract or private carriers, with store delivery trucks contributing. That is to say, whether the part played by interstate commerce was inconsequential or not

was not shown. In any event, even though interstate commerce contributed in such proportion as to warrant some form or measure of control, it seems to us new doctrine that a state through its Commission has power to altogether stop operations in interstate commerce, or any of them, and this even in the absence of federal legislation, as was the case when the Texas Commission's order was entered.

However, it will be kept in mind, that the assumption in the lower court's decision upon which its validity depends and is, indeed, bottomed by the court itself, is that such authority in a state commission to stop operations in interstate commerce does not conflict with the federal Motor Carrier Act, the one reason of the Court being that above discussed, about the hazards at its approaches of large centers of population due to congestion from commercial operations from intrastate operations and vehicles, on the one hand, and interstate operations, on the other hand; and with this, the Court couples its erroneous construction of the federal act as to authorization of interstate operations, that is, its view that while the federal act prohibits such operations without a certificate in force, it does not provide that each and every applicant receiving one shall be entitled to the use of the various highways of a state. This latter has already been shown to be a misconstruction of the act's language as to certificates of authority generally.

But another thing, particularly pertinent in this case and of great general importance is that the Court cannot have carefully examined the language and considered the purpose of the so-called "grandfather" clause of section 206.

Petitioner was at the time of, and for a number of years prior to, the enactment of the Federal Motor Carrier Act a common carrier by motor truck operating exclusively in interstate commerce over the so-called "federal aid" highways above specified in the statement; and he has ever since been so continuously engaged in such interstate operations. The case, here on review, had its inception by suit filed by petitioner, after enactment of the Act, in the United States District Court, Northern District of Texas to enjoin officials of the state from interfering with his operations in interstate commerce. The District Court, by preliminary order and permanent decree granted the relief prayed for enjoining interference with petitioner's operations, based upon findings of fact and the conclusion that the Federal Motor Carrier Act had superseded the Texas law in so far as it required state authority for the operations in interstate commerce. This decree was reversed by the judgment and decision, before this Court for review, that decision necessarily hinging and depending upon the lower court's view that denial under state law of authority for operations in interstate commerce, which this Commission is authorized to

grant, and may have done so, under the federal act, is not in conflict with the federal act. The reasons why there would be conflict in every case have been given. But in addition the lower court overlooked the fact that this is a case under the grandfather clause and the language and purpose of that clause.

The grandfather clause (sec. 206) is one of the most important provisions in the Motor Carrier Act, 1935, both presently and for many years to come. Appreciation of its purpose and attention paid to its language, is essential to the rights, both of the carriers who have investments made, and business built up, those of shippers relying on their services, and to the country as a whole under the announced policy of Congress in section 202 of the act to promote interstate operations by motor, over the highways, to preserve their inherent natural advantages to the end of developing and preserving "a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense."

This expressly announced policy should be considered, not only in connection with the source of the constitutional powers upon which the legislation rests, but also in construing the subsequent individual provisions of the act; that is, so as not to "cripple" any of them without complete justification and full consideration of the will and purposes of Congress under its constitutional powers.

Federal regulation of motor carriers was imposed upon an industry long established and its provisions requiring certificates of authority to operate, so far as applying to carriers then in operation (of which petitioner is one), was purposely designed with that in mind. Such a carrier upon filing his application within the time provided for is given direct statutory authority, namely authority from Congress itself, to continue his operations pending action thereon by the Commission. In acting upon his application the showing required is not the same as for new operations, but is simply that he shall have been in "bona fide" operation on June 1, 1935, and upon the latter showing, the certificate of authority is given without further proof, or further proceedings (sec. 206).

The reasons for the distinction made between carriers proposing new operations and those already engaged therein are obvious. For one thing there is the announced policy of Congress (sec. 202) to preserve a highway transportation system adapted to the needs of the commerce of the United States and the national defense; and there is the consideration that motor carrier transportation was an established industry, those engaged therein having invested their money and time, and persons and industries having become dependent thereon, and sometimes wholly so. The reason, then, is plain that, if authority was to be required at all of those engaged in the business, their right to continue

operation and the rights of shippers and consumers who had grown to depend thereon, could not await even the filing of applications, and, therefore, the statute itself gives them such authority pending action thereon by the Commission. When petitioner filed his complaint in the District Court the federal motor carrier act was in force and petitioner was then and had been for some years engaged in operations in interstate commerce over the highways involved. Petitioner filed application with this Commission for authorization of his interstate operations within the time provided for and otherwise complying with the Act and the Commission's rules and regulations (R. 151, 36).[2] Accordingly, at the time of the District Court's decision and decree, reversed by the judgment and decision of the appellate court, which are before this Court for review, the situation was that petitioner, common carrier by motor, was, as thousands of others were and still are, operating in interstate commerce under direct statutory authority (sec. 206). This, in and of itself, shows that the lower court was wrong in its basic premise that the requirement upon petitioner that it obtain state authority for operations in interstate commerce, when at the very time it had direct authority therefor under the federal statute, was not in conflict with the federal statute, since it can hardly be assumed that Congress while protecting as lawful the operations in interstate commerce of those already

[2] Report and Recommended Order of Joint Board 16 in M. C. 80, 415, for granting application.

established in the business at the time of the Act pending action by this Commission on the carrier's application intended that the same operations in interstate commerce might be stopped either by one, or any of the forty-eight states, interrupting the services rendered to those relying, or dependent thereon, and doubtless in many cases destroying the carriers' ability to resume it; all of which most certainly conflicts with the purpose and intent of Congress to promote and preserve a highway system of transportation for the needs of the public and the national defense. Furthermore, the situation in this case under the federal statute shows how completely Congress has by that statute occupied the field of "authorization" of common carriage in interstate commerce by motor.

Furthermore, it will have been noted that as to the "grandfather" authorizations, so important to the preservation of what has already been established, the certificate of authorization issues upon showing that the carriers were in bona fide operation in interstate commerce at the time of the Act and continuously thereafter. This further demonstrates that Congress, by the Motor Carrier Act, occupied the whole field of "authorization" of interstate motor common carriage, for it could not be that it left to the states, or any of them, the right to enact laws subsequent to the act which either as matter of fact or law made interstate operations not bona fide which had been bona fide; neither

could it be that, as to such state laws which before 1935 either expressly (if any), or by court construction required state authority for interstate commerce, Congress intended to make exceptions, thus discriminating in their favor, or (as it might well prove to be true) against them. The truth is that under any reasonable construction of the "grandfather clause" the question of "bona fide operation" is committed to this Commission and, as such, it cannot be supposed that Congress intended the Commission to examine and construe state laws, but prescribed the matter of bona fide operation wholly as one of fact. As stated in the *Slagle Case*, 2 M. C. C. 12:

> Prior to the passage of the Act, most of the states had undertaken to regulate to some extent motor carriers engaged in intrastate commerce, and some had undertaken to extend the regulation in various respects to those engaged in interstate or foreign commerce. There were a great variety of such laws and like variations in enforcement. Enforcement was vigorous in some states and lax in others, and, as was natural, laxity was more prevalent as to interstate operations. In the absence of Federal regulation, the situation was a most difficult one for the states which was one of the reasons why their regulatory authorities very generally favored such regulations. The records show that Congress was fully informed in regard to this situation. It might readily, in clear

and unmistakable language, have made compliance with State laws a prerequisite to rights under the "grandfather" clauses, and have indicated how we could determine the fact of compliance or non-compliance. This, however, it did not do. Instead, it employed the phrase *"bona fide"* operation, making registration "under any code of fair competition" evidence of such operation on June 1, 1935, but saying nothing about state laws, which were not mentioned in committee reports or debates in connection with the phrase *"bona fide operation."*

At two places in the Act, Congress made specific provision for compliance with state laws as a prerequisite to obtaining a privilege. Under section 203 (b) (8) a carrier of passengers is not entitled to an exemption that he might otherwise be accorded unless he is "lawfully engaged in the intrastate transportation of passengers in accordance with the laws of each state having jurisdiction." Under section 206 (a) a carrier who has procured a certificate under state laws authorizing intrastate common carrier service is relieved of the requirement of making proof of public convenience and necessity for conducting the same operation in interstate commerce. It seems unlikely that if Congress had intended to make compliance with State laws a condition precedent to "grandfather" privileges, it would have failed to make the same specific provisions that it did in respect to other privileges.

In short under any reasonable construction of the Act at all, Congress has occupied the whole field of "authorization" of interstate common carriage by motor.

Some point is made by respondents that the federal act should be read in such manner as that it would not be unconstitutional, but it would appear that this should be applied not to the federal act, which is wholly clear in its language and purpose, and in the fact that it only purports to apply to interstate commerce, but rather to the state act which speaks of motor transportation within the state generally, that is, without express statement that it applies, or was meant to apply, to interstate commerce. And, while it has been held by this Court to so apply in certain matters of limited control (this before enactment of the federal act), the state act most certainly has not been held to give jurisdiction to the State Commission as to authorization of operations in interstate commerce, which, as is so plainly brought home by this case would mean (if any authority at all) that the State Commission could stop such interstate commerce altogether, not only as to petitioner but others.

As above indicated, it is not believed that this could be done even in the absence of federal legislation under the Commerce Clause. And as petitioner McDonald's brief points out, the courts of the state since enactment of the federal act have endeavored to preserve its constitutionality by not

construing it to confer such jurisdiction on the State Commission. Petitioner also refers to decisions of Florida courts rendering like decisions since enactment of the federal act.

The truth is that under the bare commerce clause itself, that is, in the absence of the federal Motor Carrier Act, it seems to us wholly new doctrine that a state (which means any of the states that choose to do so) could either directly, or through its Commission have power, not simply to control in some manner conducive to safety, but to *stop* operations in interstate commerce. There are, of course, many things, constituting interstate commerce, but underlying and necessary to all is interstate transportation, except perhaps interstate transmission of messages. This, it seems to us, should be kept in mind in connection with the many decisions as to the limits of state authority in respect of interstate commerce. For long before railroad transportation was a thing known at all, the roads and highways were the principal, and sometimes, the only mediums of commerce between the states. It is not believed that the "Commerce Clause" is changed because there has been added to other forms of interstate commerce, that by motor vehicle, particularly having in mind the conditions that brought about its adoption and that there are now forty-eight states instead of thirteen.

All of the above is intended to relate to the contention of respondent as to its proprietary rights

of its highways; for it cannot be disputed but that, along with the adoption of the Commerce Clause, the states opened their roads and highways to interstate commerce with those limitations always obtaining, but always with the federal government paramount where it has occupied the field; that being so even as to matters pertaining to safety where, as in the present case, the state's law (as construed to empower its commission to deny common carrier operations exclusively interstate over highways within the state) inescapably would conflict with the federal act, whereunder the same operations in interstate commerce might be authorized. As confirming that the use of the highways for interstate commerce was granted by adoption of the Commerce Clause, mention might be made of the many decisions of this Court which have held state laws regulating use of their highways in interstate commerce valid "in the absence of regulation" by Congress. And as further confirming the same the following is quoted from *Bush Co.* v. *Maloy,* 267 U. S. 317, 323, 324:

> A statute of Maryland prohibits common carriers of merchandise or freight by motor vehicle from using the public highways over specified routes without a permit. The Public Service Commission is charged with the duty to "investigate the expediency of granting said permit" when applied for; and it is authorized to refuse the same if it "deems the granting of such permit preju-

dicial to the welfare and convenience of the public." Laws of Maryland, 1922, c. 401 § 4.

This case presents two features which were not present in *Buck* v. *Kuykendall*, *ante*, p. 307, decided this day. The first is that the highways here in question were not constructed or improved with federal aid. This difference does not prevent the application of the rule declared in the *Buck Case*. The federal-aid legislation is of significance, not because of the aid given by the United States for the construction of particular highways, but because those acts make clear the purpose of Congress that state highways shall be open to interstate commerce. The second feature is that here the permit was refused by the Commission; not in obedience to a mandatory provision of the state statute, but in the exercise, in a proper manner, of the broad discretion vested in it. This difference also is not of legal significance in this connection. The state action in the *Buck Case* was held to be unconstitutional, not because the statute prescribed an arbitrary test for the granting of permits, or because the Director of Public Works had exercised the power conferred arbitrarily or unreasonably, but because the statute as construed and applied invaded a field reserved by the Commerce Clause for federal regulation.

The events leading up to the passage of The Motor Carrier Act, 1935 (U. S. Code, Sup. I, Title 49, Chapter 9) are well known. By that Act, Con-

gress entered for the first time upon the field of regulation of motor carriers operating in interstate commerce upon the highways of the Nation. For some years prior thereto many of the states had enacted laws providing for the regulation of motor carriers operating within their borders, but because of the diversity in such laws and the inability of such states to regulate these carriers in many particulars, even in the absence of federal regulation, there was an insistent public demand for regulation by the National Government. That Congress intended to adopt at one time a comprehensive regulatory scheme for such carriers is evident from an examination of the Act. General duties and powers are given to the Commission in the regulation of common carriers by motor vehicle, as well as of contract carriers and brokers (Section 204); over certificates of public convenience and necessity for operation in interstate or foreign commerce on any public highway (Section 206); over permits for contract carriers (Section 207); over brokers and brokerage licenses (Section 204 (4) and Section 211); over the suspension, revocation, and transfer of certificates and permits (Section 212); over consolidations, mergers, and acquisition of control (Section 213); over the issuance of securities (Section 214); over security for the protection of the public (Section 215); over rates, fares and charges of common carriers by motor vehicle (Section 216); over tariffs of common car-

riers and of contract carriers by motor vehicle (Sections 217 and 218); over accounts, records, and reports (Section 220), and many other matters referred to in the Act, the better to enable the Commission to carry out the declaration of policy embodied in Section 202 (a), which reads:

> It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and co-ordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.

2. Federal power is paramount

We had supposed that at least since *Gibbons* v. *Ogden*, 9 Wheat. 1, it was settled that where there was repugnancy between state and federal law, the

latter prevailed. In that case, Chief Justice Marshall said:

> Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the states may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of congress passed in pursuance of the constitution, the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that state, have, in their application to this case, come into collision with an act of congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial, whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several states," or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous. This opinion has been frequently expressed in this court, and is founded, as well on the nature of the government, as on the words of the constitution. In argument, however, it has been contended, that if a law passed by a state, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by congress in pursuance of the constitution,

> they affect the subject, and each other, like equal opposing powers. But the framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the constitution, is produced by the declaration, that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but though enacted in the execution of acknowledged state powers, interfere with, or are contrary to, the laws of congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it (Id. 210–211).

In *Chicago, I. & L. Ry. Co.* v. *United States,* 219 U. S. 486, involving the question of whether a common carrier could accept for services rendered other than cash, this Court said:

> We need say but little about the Indiana statute upon which the defense is in part based. The transactions, in respect of which the Government seeks relief, being interstate in their character, the acts of Congress as to such transactions are paramount. No

state enactment can be of any avail when the subject of such transactions has been covered by an act of Congress acting within the limits of its constitutional powers. It has long been settled that when an "act of the legislature of a State prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the state law must give way, and this without regard to the source of power whence the state legislature derived its enactment." *Sinnot* v. *Davenport*, 22 How. 227, 243; *M., K. & T. Railway* v. *Haber*, 169 U. S. 613, 686; *Reid* v. *Colorado*, 187 U. S. 137. This results, Chief Justice Marshall said in *Gibbons* v. *Ogden*, 9 Wheat. 1; as well from the nature of the Government as from the words of the Constitution (Id. 497).

In *Reid* v. *Colorado*, 187 U. S. 137, relating to importation of infected cattle, this Court said:

> It is quite true, as urged on behalf of the defendant, that the transportation of live stock from State to State is a branch of interstate commerce and that any specified rule or regulation in respect of such transportation, which Congress may lawfully prescribe or authorize and which may properly be deemed a regulation of such commerce, is paramount throughout the Union. So that when the entire subject of the transportation of live stock from one State to another is taken under direct national supervision and a system devised by which diseased stock may be excluded from interstate commerce,

all local or State regulations in respect of such matters and covering the same ground will cease to have any force, whether formally abrogated or not; and such rules and regulations as Congress may lawfully prescribe or authorize will alone control. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Morgan* v. *Louisiana*, 118 U. S. 455, 464; *Hennington* v. *Georgia*, 163 U. S. 299, 317; *N. Y., N. H. & H. R. R. Co.* v. *New York*, 165 U. S. 628, 631; *Missouri, Kansas & Texas Railway Co.* v. *Haber*, 169 U. S. 613, 626; *Rasmussen* v. *Idaho*, 181 U. S. 198, 200. The power which the States might thus exercise may in this way be suspended until national control is abandoned and the subject be thereby left under the police power of the States (Id. 146–147).

In *Southern Ry. Co.* v. *Reid*, 222 U. S. 424, this Court stated the question as follows:

> The question in the case is the validity of an act of the State of North Carolina which requires the agents and officers of railroads and other transportation companies to receive freight for transportation whenever tendered at a regular station, and every loaded car tendered at a side track or any warehouse connected with the railroad by a siding, and forward the same by a route selected by the person tendering the same, under penalty of forfeiting $50 a day to the aggrieved party for each day of refusal to receive such freight and all damages actually sustained.

To give the states the power sought to be here exercised, said the court:

> would destroy absolutely Federal control until the freight was in the possession of the carrier, and is directly contradictory of the provision of the Interstate Commerce Act which we have quoted. See, in this connection, *Houston & Texas Cent. R. R. Co.* v. *Mayes,* 201 U. S. 321. * * * By these provisions Congress has taken possession of the field of regulation, with the purpose, which we have already pointed out, to keep under the eye and control of the Commission the rates charged and the action of the railroad in regard to them, to secure their reasonableness and to secure their impartial application. The statute of North Carolina conflicts with these requirements. What they forbid the carrier to do the statute requires him to do and punishes disobedience by successive daily penalties.

In *Minnesota Rate Cases,* 230 U. S. 352, this Court held that the paramount authority of Congress enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, Congress may displace local laws by substituting laws of its own.

As stated in *Missouri, Kansas & Texas Ry. Co.* v. *Harris,* 234 U. S. 412.

> It is of course settled that when Congress has exerted its paramount legislative author-

> ity over a particular subject of interstate commerce, state laws upon the same subject matter are superseded.

Again, in *Chi., R. I. & P. Ry.* v. *Hardwick Elevator Co.*, 226 U. S. 426, in a case considering the validity of the Minnesota reciprocal demurrage law in the light of the Interstate Commerce Act dealing generally with the subject of delivery of cars, this Court said:

> As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulaiton, even if such subject was embraced within that class of powers concerning which the State had a right to exert is authority in the absence of legislation by Congress, it must follow in consequence of the action of Congress to which we have referred that the power of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where from the particular nature of certain subjects the State may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such

> action, when exerted covers the whole field and renders the State impotent to deal with a subject over which it had no inherent but only permissive power (p. 435).

That the entry of the national government into the field of regulation of interstate commerce will exclude state power thereover, as to all matters coming within the general purposes of the federal legislation is made clear in a number of decisions of the Court.

In *N. Y. Cent. R. R. Co.* v. *Winfield*, 244 U. S. 147, a New York workmen's compensation act was held inapplicable to railroad employees engaged in interstate commerce, because of the Federal Employer's Liability Act. The federal act purported only to change the rules of liability in negligence cases, while the New York act provided for liability regardless of negligence. It was argued that both acts might stand, as they covered different fields. This the court denied, saying:

> * * * If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose.

In *Kansas City So. Ry. v. Van Zant*, 260 U. S. 459, the Hepburn Act of 1906, prohibiting free railroad passes for interstate journeys, except to a limited class of persons, was held to nullify all state laws pertaining to liability for injuries sustained by persons while using such passes. Thereafter liability in such cases is determined by Federal law, although the free pass law made no reference to liability.

Prior to 1910, the liability of telegraph companies for negligence in sending or delivering messages was determined by local law, fixed in many states by statutes. The Mann-Elkins Act of 1910, brought telegraph companies under the general provisions of the Interstate Commerce Act relating to uniformity of rates and equality of service. No provision in the act pertained to liability for negligence, but the Supreme Court held that in view of the general purposes of the act, state laws covering liability were invalid from the time of the entry of the National Government into the field of regulation. It said:

> We think it clear that the act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the act to regulate commerce to establish, a purpose which would be wholly destroyed if, as held by the court below, the validity of contracts made by telegraph companies as to their interstate commerce business con-

tinued to be subject to the control of divergent and it may be conflicting local laws.

Postal Tel. Co. v. *Warren-Godwin L. Co.*, 251 U. S. 27.

To the same effect is *Western Union Tel. Co.* v. *Boegli*, 251 U. S. 315, where the court said:

> The proposition that the act of 1910 must be narrowly construed so as to preserve the reserved powers of the state over the subject in hand, although it is admitted that that power is in its nature federal and may be exercised by the state only because of nonaction by Congress, is obviously too conflicting and unsound to require further notice. We therefore consider the statute in the light of its text and, if there be ambiguity, of its context, in order to give effect to the intent of Congress as manifested in its enactment.
>
> As the result of doing so, we are of the opinion that the provisions of the statute bringing telegraph companies under the Act * * * so clearly establish the purpose of Congress to subject such companies to a uniform national rule as to cause it to be certain that there was no room thereafter for the exercise by the several states of power to regulate, by penalizing the negligent failure to deliver promptly, an interstate telegram * * *.

3. There can be no divided authority over interstate commerce

It would be difficult to find a case so clearly illustrating the principle that there can be no divided

authority over interstate commerce than the one now before the court. Indeed, we think it is highly questionable, if the decision of the Circuit Court of Appeals is correct, that there is even a divided authority on the part of the National Government. Rather it would seem that the state is supreme. For if a certificate from the Interstate Commerce Commission to a motor vehicle carrier to operate in interstate commerce does not mean anything unless the states through which the carrier runs happen to reach the same conclusion as to interstate operation as the Federal Commission, then it would seem that the states have the final and dominant say. The anomalous situation would prevail of the State possessing a veto authority over matters granted to the Federal Government under the Constitution. It is well settled, however, by your decisions that "there can be no divided authority over interstate commerce." To escape this conclusion the lower court appears to rest its decision upon the ground that there is no conflict as between the federal and the state laws because the regulations of the State Commission and the operations of state laws go more to safety of the public on the highways, a matter peculiarly within the control of the state. Whatever the underlying grounds, the fact remains that there is a conflict between the Federal and the State Governments on the same subject matter, because it would lie within the authority of Texas, under the decision of the lower

court in this case, to nullify any grant of authority given by the Interstate Commerce Commission. And, of course, if Texas has the authority to so nullify, it must be conceded that other states under similar laws could be given similar authority. When we consider the number of motor vehicle operators with vehicles running into two or more states, the possible consequences of such a holding become painfully apparent. Such a holding would make the efficacy of the Federal act rest upon the mere permission of the State. That such is not the law is clear from this Court's decision in *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 612–613, where you said:

> The federal and the state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that even if the Commission has power to prescribe an automatic fire-box door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state leg-

> islation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose. * * *

We will not cite the cases holding that there can be no divided authority over interstate commerce; one will suffice. In *Missouri Pacific R. Co.* v. *Stroud*, 267 U. S. 404, 408, you said:

> * * * It is elementary and well settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive. Transportation from Oxly to Saint Louis over the route partly within and partly outside of Missouri is interstate commerce. *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617, 620; *Western Union Telegraph Co.* v. *Speight*, 254 U. S. 17. It was shown that the shipment would have moved by that route. The record discloses no facts which would impose upon petitioner any obligation to haul respondent's lumber over the intrastate route. See *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477, 482. The state law has no application to the furnishing of cars to shippers for the transportation of freight in interstate commerce. *Chicago, Rock Island & Pacific Ry.*

v. *Hardwick Elevator Co.*, 226 U. S. 426, 435; *Southern Ry. Co.* v. *Reid*, 222 U. S. 424, 435. *Steel* v. *Railroad*, 165 Mo. App. 311; 317 (Id. 408).

4. The police powers of the state are subject to the provisions of the Federal Constitution

The Circuit Court of Appeals based its decision of no conflict between the state and federal authorities because the Motor Truck Laws of Texas require the Railroad Commission ~~of the State~~ of Texas to determine whether or not the preservation of its highways and the safety of the traveling public will be endangered if there is an excessive amount of traffic on the highways (R. 169).

It is a well-recognized principle that police powers, otherwise within the constitutional power of the state, will be upheld if interstate commerce is only remotely and indirectly affected. *Silz* v. *Hesterberg*, 211 U. S. 31; *Southern Ry. Co.* v. *King*, 217 U. S. 524; *Townsend* v. *Yeomens*, 301 U. S. 441; *Erie R. Co.* v. *Williams*, 233 U. S. 685; *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197; *North Dakota* v. *Hanson*, 215 U. S. 515; *Adams Express Co.* v. *New York*, 232 U. S. 14; *Atlantic Coast Line R. Co.* v. *Georgia*, 234 U. S. 280, *Asbell* v. *Kansas*, 209 U. S. 251.

It is also settled that a state statute which is a burden on interstate commerce is not saved by calling it an exercise of the police power. *Charleston & Car. R. Co.* v. *Varnville Co.*, 237 U. S. 597.

In *Adams Express Co.* v. *Croninger,* 226 U. S. 491, it was held that only the silence of Congress allows a state to exercise its police power over interstate commerce, and when Congress speaks, it governs.

Western Union Telegraph Co. v. *Pendleton,* 122 U. S. 347, is authority for the holding that the police powers of a state cannot encroach on the powers vested in Congress by the Federal Constitution. (See also *Central of Georgia Ry.* v. *Murphey,* 196 U. S. 194.)

In *Southern Ry. Co.* v. *Virginia,* 290 U. S. 190, 196, 198, this Court held that the police power as well as all other powers of the state, are subject to the provisions of the Fourteenth Amendment.

In *Missouri, Kansas & Texas Ry. Co.* v. *Harris,* 234 U. S. 412, this Court held that when the Congress exerts its paramount authority over interstate commerce, state laws are superseded. Examples of state laws which have been held void because in actual conflict with Acts of Congress will be referred to.

In *Nashville, C. & St. L. Ry. Co.* v. *Walters,* 294 U. S. 405, this Court held that the police power of the state is subject to the constitutional limitation and that its action must not be arbitrary (415).

In *Asbell* v. *Kansas,* 209 U. S. 251, this Court held that while a state may, under its police power, enact inspection laws on traffic coming from other states, in the absence of action by Congress, the Court will

determine for itself whether the state is genuinely exercising its police power or whether it is regulating interstate commerce.

In *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, this Court held that even when the particular subject remains unregulated by Congress a state cannot lay burdens on interstate commerce under the guise of police regulations.

In *Adams Express Co.* v. *Kentucky*, 214 U. S. 218, the Court held that any exercise of a power by a state regulating interstate commerce is void, and that when the police power conflicts with powers of Congress it is superseded.

Examples of state laws that have been held invalid because they directly affect interstate commerce are as follows:

In *Herndon* v. *Chicago, R. I. & P. Ry. Co.*, 218 U. S. 135, this Court held that where a railroad had already provided adequate accommodations at a particular point, a state law requiring interstate trains to stop at such point is a burden on interstate commerce.

In *DiSanto* v. *Pennsylvania*, 273 U. S. 34, the Court held that the solicitation of passengers and the sale of steamship tickets for passage between the United States and Europe is a part of foreign commerce and a state law directly interfering therewith was invalid, regardless of the purpose for which the state law was passed.

In *McLean* v. *Denver & Rio Grande R. Co.*, 203 U. S. 38, the Court held that even an inspection law affecting interstate commerce would be invalid if in conflict with an Act of Congress, or an attempt to regulate interstate commerce.

In *St. Louis-San Francisco Ry. Co.* v. *Missouri Commission*, 261 U. S. 369, this Court held that an order of the State Commission requiring the railroad company to stop a designated train at a particular city to take on and discharge passengers was void as a burden on interstate commerce. Other decisions of this Court holding that orders requiring fast trains to stop at towns already adequately served constitute burdens on interstate commerce are *Mississippi* v. *Illinois Cent. R. Co.*, 203 U. S. 335; *Illinois Cent. R. Co.* v. *Illinois*, 163 U. S. 142, and *St. Louis-San Francisco Ry. Co.* v. *Missouri Commission*, 254 U. S. 535.

In *Missouri, Kansas & Texas R. Co.* v. *Texas*, 245 U. S. 484, an order of the Texas Commission requiring passenger trains to leave stations on scheduled time, with thirty minutes allowance to make connections, was void as a burden on interstate commerce. To compel railroads to try cases in a state remote from where the cause of action arose was held to constitute a burden on interstate commerce in *Davis* v. *Farmers Co-Operative Ass'n.*, 262 U. S. 312, and in *Michigan Central R. Co.* v. *Mix*, 278 U. S. 492.

An order of a State Commission preventing a railroad company from removing its shop and division point to another place in the same state was held invalid in *Lawrence* v. *St. Louis-San Francisco Ry. Co.*, 278 U. S. 228. To the same effect see *Texas* v. *United States*, 292 U. S. 523.

In *Ingels* v. *Morf*, 300 U. S. 290, this Court construed the Caravan Act of a state and held that the fee exacted thereunder was a burden on interstate commerce because in excess of the cost of regulation.

In *Matson Co.* v. *California*, 297 U. S. 441, this Court held that a tax by the state on earnings from interstate commerce was void as constituting a burden on interstate commerce.

In *Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307, this Court held that a tax by a state on gross receipts from sales in interstate commerce was void as a burden on that commerce.

In *Puget Sound Co.* v. *Tax Commission of Washington*, 302 U. S. 90, the Court held that a tax by the state from business of stevedoring, which was interstate commerce, was void as constituting a burden thereon.

In *Cooney* v. *Mountain States Telephone Co.*, 294 U. S. 384, the Court held that an act of a state imposing a tax on telephones irrespective of their use in interstate or intrastate commerce was void as a burden on interstate commerce.

A municipal ordinance requiring everyone going from place to place, taking orders for future deliveries and receiving deposit in advance, to secure a license and pay a fee before engaging in such business, was void as a burden on interstate commerce as applied to solicitors of a corporation engaged in manufacturing goods in another state and selling them direct to consumers on orders taken by associates. *Real Silk Hosiery Mills* v. *Portland,* 268 U. S. 325. (See also *Crutcher* v. *Ky.,* 141 U. S. 47.)

A state law requiring articles in interstate commerce to be labelled under the Pure Food Law of a state was held void as a burden on interstate commerce in *McDermott* v. *Wisconsin,* 228 U. S. 115.

Other decisions of this Court dealing with the question of what constitutes a burden on interstate commerce are so numerous that further citation seems unnecessary.

In *Robbins* v. *Shelby Taxing District,* 120 U. S. 489, this Court held that the people of this country are citizens of the United States as well as of individual states and have some rights under the United States Constitution, free from interference or restraint by the State.

In *Carley & Hamilton* v. *Snook,* 281 U. S. 66, this Court held that in cases arising under the Commerce Clause, it must ascertain for itself whether a forbidden burden on interstate commerce is imposed.

In *Minnesota Rate Cases,* 230 U. S. 352, this Court said:

> They have no power to prohibit interstate trade in legitimate articles of commerce (citing cases); or to exclude from the limits of the state corporations or others engaged in interstate commerce, or to fetter by conditions their right to carry it on (citing cases); or to prescribe the rates to be charged for transportation from one state to another, or to subject the operations of carriers in the course of such transportation to requirements that are unreasonable or pass beyond the bounds of suitable local protection (citing cases).

In *Brown* v. *Houston,* 114 U. S. 622, the Court said:

> * * * It is a plain regulation of interstate commerce, a regulation extending to prohibition. Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. In short, it may be laid down as the settled doctrine of this court, at this day, that a State can no more regulate or impede commerce among the several States than it can regulate or impede commerce with foreign nations.

That the States lack the power to grant or deny operating authority to motor carriers engaged in interstate commerce has been settled law since the

case of *Buck* v. *Kuykendall*, 267 U. S. 307, decided in 1925. There Buck applied to the Washington authorities to operate a motor carrier line within that State as part of a route between Seattle and Portland, Oregon. The Oregon Commission had granted him authority, but the Washington official denied his application under a provision of the State statute which prohibited common carriers for hire from use of the State highways without having first obtained a certificate of public convenience and necessity from the State. The court said:

> It may be assumed that Section 4 of the state statute is consistent with the Fourteenth Amendment; and also, that appropriate state regulations adopted primarily to promote safety upon the highways and conservation in their use are not obnoxious to the Commerce Clause, where the indirect burden imposed upon interstate commerce is not unreasonable. Compare *Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 571. The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. Moreover, it determines whether the prohibition shall be applied by

> resort, through state officials, to a test which is peculiarly within the province of federal action—the existence of adequate facilities for conducting interstate commerce. The vice of the legislation is dramatically exposed by the fact that the State of Oregon had issued its certificate which may be deemed equivalent to a legislative declaration that, despite existing facilities, public convenience and necessity required the establishment by Buck of the auto stage line between Seattle and Portland. Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause.

To the same effect is the case of *Bush Co.* v. *Maloy,* 267 U. S. 317. These cases, and the principle therein announced, have been followed by State and Federal courts. See *United States* v. *Scott,* 10 Fed. Supp. 453–9; *Asher* v. *Ingels,* 13 Fed. Supp. 654; *United States* v. *Union Pac. R. Co.,* 20 Fed. Supp. 665.

Of particular significance is the decision of the three-judge court for the Northern District of Texas, in *Sage et al.* v. *Baldwin,* 55 Fed. (2d) 968, decided February 5, 1932. This case involved facts quite similar to the case at bar. Petitioners were engaged exclusively in interstate commerce through the State of Texas as contract carriers, and while

engaged therein were threatened with arrest by defendant because of their failure to comply with the motor carrier order of Texas effective August 22, 1931 (Vernon's Ann. Civ. St. Tex. Art. 911b, Section 1 et seq.), which is the identical law before this Court. In the *Sage case,* decided prior to the Motor Carrier Act of 1935, the Court held that "interstate commerce in all of its forms, must be free from any substantial burden sought to be exercised by any state." In its decision and as affording a basis for the decree to be entered, the Court said:

> Preserving, therefore, the rights of the state and the rights of the nation, the respondents will be enjoined from interfering with the operations of the complainants, or from arresting them for alleged violations of this law, so far as any rates may be concerned, or so far as any bond securing any shipper may be concerned, *or so far as any certificate of public convenience or necessity is concerned,* or so far as the impairment of any other service, either contract or common carrier is concerned, * * *. [Italics ours.] (Id. 971.)

In the course of its opinion the Court referred to the decision of the Supreme Court of Iowa in *State* v. *Martin,* 210 Iowa, 207, 230 N. W. 540, where that court had under consideration a general statute directed at automobile carriers. Speaking of this Iowa decision in the *Sage case,* the court said:

> * * * The provision therein for bonds and for a certificate of convenience and necessity was manifestly invalid as to interstate commerce carriers, * * * (p. 970).

If as the Court held, the State Commission had no authority over certificates of public convenience and necessity in interstate commerce prior to the passage of the Motor Carrier Act, it needs no argument to show that after Congress had occupied the field and by specific legislation with respect to the subject matter, no vestige of a claim for authority on the part of the states can be made.

CONCLUSION

This case is one that has been peculiarly susceptible for presentment of our views based upon prior decisions of the court. It is certain from those authorities that complete elimination of petitioner from a right to operate in interstate commerce is a positive and direct burden on interstate commerce, and a practice more onerous and harmful than many others heretofore held void by this Court.

We attach no particular significance to the decision of this Court in *South Carolina Highway Department* v. *Barnwell Bros.*, 303 U. S. 177, where the court held that in the absence of national legislation, a state could adopt regulations limiting the

weight and width of vehicles, applicable without discrimination to those moving in interstate and intrastate commerce. Here the situation is that operations in interstate commerce authorized under the Federal Motor Carrier Act, may, according to the decision of the lower court, be denied by a state commission.

As heretofore shown, it is declared to be the purpose of Congress in Section 202 (a) "to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation."

It is apparent that state power of control, particularly in a negative manner, that is, by denying a certificate, in the matter of certificates or permits for operations in interstate commerce, is in direct conflict with the expressed purposes of the Motor Carrier Act.

Further than this, in Section 202 (c) of the Motor Carrier Act, Congress undertook to name the powers previously exercised by the states which it did not desire to touch. The powers of taxation and regulation of intrastate commerce are there expressly reserved for state control. If other matters, including state certificates to operate in interstate commerce, were intended to be reserved for the states, this section was the natural place to so declare.

We have had an opportunity to examine the brief filed by the Attorney General of Texas, on behalf of the Railroad Commission of that State, and it seems to us that there is nothing inconsistent therein with our contentions. The authorities relied upon so heavily there went to the police power of the State to indirectly affect interstate commerce by appropriate *regulations;* they do not support the claim here that the State has the right of *prohibition* against operators in interstate commerce. The distinction is between reasonable regulation that incidentally affects interstate commerce and absolute prohibition that actually impedes the flow of such commerce. We submit that the latter is the question here, and such a result may not be accomplished by calling it an exercise of the police power.

This case presents considerations which have a vital effect upon the principles of regulation generally. It is of importance in the proper administration of the duties of the Commission that its power and authority shall be defined by this Court and we respectfully submit that the effectiveness of this authority should not be made to depend upon the State Commission and the Interstate Commerce Commission reaching the identical conclusion.

For the reasons above set further we request that the judgment of the Circuit Court of Appeals

should be reversed and the action of the District Court sustained.

DANIEL W. KNOWLTON,
E. M. REIDY,
For Interstate Commerce Commission.

NOVEMBER 7, 1938.

APPENDIX

Pertinent provisions of The Motor Carrier Act, 1935, U. S. Code, Sup. I, Title 49, Chapter 9,[1] are:

SEC. 201. [*Added August 9, 1935.*] [*U. S. Code, Sup. I, title 49, sec. 301.*] This part may be cited as the "Motor Carrier Act, 1935."

DECLARATION OF POLICY AND DELEGATION OF JURISDICTION

SEC. 202. [*Added August 9, 1935.*] [*U. S. Code, Sup. I, title 49, sec. 302.*] (a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a

[1] The act of August 9, 1935 (49 Stat. L. 543), amended the Interstate Commerce Act, as amended, by substituting for the words "this Act," wherever they occurred, the words "this part," but provided that "such part I may continue to be cited as the 'Interstate Commerce Act,' and that the Interstate Commerce Act should be further amended by adding Part II, the Motor Carrier Act, 1935.

highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.

(b)[2] The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

(c)[3] Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

DEFINITIONS

SEC. 203. [*Added August 9, 1935.*] [*U. S. Code, Sup. I, title 49, sec. 303*][4] (a) As used in this part—

(1) The term "person" means any individual, firm, copartnership, corporation, company, association, or joint-stock associa-

[2] For similar declaration as to applicability of part I, see sec. 1 (1), ante.

[3] Saving clause as to part I, sec. 1 (2) (a), ante.

[4] Definitions of terms employed in part I, sec. 1 (3); of transportation territorially subject to part I, sec. 1 (1), ante.

tion; and includes any trustee, receiver, assignee, or personal representative thereof.

(2) The term "board" or "State board" means the commission, board, or official (by whatever name designated in the laws of a State) which, under the laws of any State in which any part of the service in interstate or foreign commerce regulated by this part is performed, has or may hereafter have jurisdiction to grant or approve certificates of public convenience and necessity or permits to motor carriers, or otherwise to regulate the business of transportation by motor vehicles, in intrastate commerce over the highways of such State.

(3) The term "Commission" means the Interstate Commerce Commission.

(4) The term "joint board" means any special board constituted as provided in section 205 of this part.

(5) The term "certificate" means a certificate of public convenience and necessity issued under this part to common carriers by motor vehicle.

(6) The term "permit" means a permit issued under this part to contract carriers by motor vehicle.

(7) The term "license" means a license issued under this part to a broker.

(8) The term "State" means any of the several States and the District of Columbia.

(9) The term "express company" means any common carrier by express subject to the provisions of part I.

(10) The term "interstate commerce" means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by

motor vehicle and partly by rail, express, or water.

(11) The term "foreign commerce" means commerce between any place in the United States and any place in a foreign country, or between places in the United States through any foreign country, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water.

(12) The term "highway" means the roads, highways, streets, and ways in any State.

(13) The term "motor vehicle" means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails.

(14) The term "common carrier by motor vehicle" means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I.

(15) The term "contract carrier by motor vehicle" means any person, not included under paragraph (14) of this section, who or which, under special and individual contracts or agreements, and whether directly or by a lease or any other arrangement,

transports passengers or property in interstate or foreign commerce by motor vehicle for compensation.

(16) The term "motor carrier" includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.

(17) The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

(18) The term "broker" means any person not included in the term "motor carrier" and not a bona fide employee or agent of any such carrier, who or which, as principal or agent, sells or offers for sale any transportation subject to this part, or negotiates for, or holds himself or itself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts, or arranges for such transportation.

(19) The "services" and "transportation" to which this part applies include all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, together with all facilities and property operated or controlled by any such carrier or carriers and used in the transportation of passengers or property in interstate or foreign commerce or in the performance of any service in connection therewith.

(20) The term "interstate operation" means any operation in interstate commerce.

(21) The term "foreign operation" means any operation in foreign commerce.

(b) Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include (1) motor vehicles employed solely in transporting school children and teachers to or from school; or (2) taxicabs, or other motor vehicles performing a bona fide taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini; or (3) motor vehicles owned or operated by or on behalf of hotels and used exclusively for the transportation of hotel patrons between hotels and local railroad or other common carrier stations; or (4) motor vehicles operated, under authorization, regulation, and control of the Secretary of the Interior, principally for the purpose of transporting persons in and about the national parks and national monuments; or (4a) motor vehicles controlled and operated by any farmer, and used in the transportation of his agricultural commodities and products thereof, or in the transportation of supplies to his farm; or (4b) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended; or (5) trolley busses operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service; or (6) motor vehicles used exclusively in carrying livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof); or (7) motor vehicles used exclusively in the distribution of newspapers;

nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the policy of Congress enunciated in section 202, shall the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; or (9) the casual, occasional, or reciprocal transportation of passengers or property in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business.

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

SEC. 206. [*Added August 9, 1935.*] [U. S. *Code, Sup. I, title 49, sec. 306.*] (a)[5] No

[5] Compare, as to certificates of convenience and necessity for carriers by railroad, sec. 1 (18)–(20), ante.

common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and

such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

ISSUANCE OF CERTIFICATE

SEC. 207. [*Added August 9, 1935.*] [*U. S. Code, Sup. I, title 49, sec. 307.*] (a)[6] Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

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[6] Compare, as to certificates of convenience and necessity for carriers by railroad, sec. 1 (18)–(20), ante.

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Supreme Court of the United States

OCTOBER TERM, 1937

No. [redacted] 55

A. E. McDONALD, *Petitioner*

vs.

ERNEST O. THOMPSON, ET AL.

Petition For Rehearing
and
Brief in Support of Motion For Rehearing

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Supreme Court of the United States

OCTOBER TERM, 1937

No. 1052

A. E. McDONALD, *Petitioner*

vs.

ERNEST O. THOMPSON, ET AL.

Petition For Rehearing

To The Honorable The Supreme Court:

NOW COMES the petitioner, A. E. McDonald, and earnestly submits his motion for a rehearing in a sincere and honest challenge of the manifest error of this Court's opinion and judgment, briefly states the position of petitioner, and for specification of such error says:

This Court's holding that petitioner was operating in violation of Texas law on June 1, 1935, and therefore was not a bona fide operator and not within the proviso of Sec. 206, Motor Carrier Act, 1935, is manifestly erroneous for two distinct reasons:

(a) The question of petitioner's bona fide operation is not before this Court for the reason that that exact question of fact is now pending before the Interstate Commerce Commission and undetermined,

and this Court under its own decisions overreached its jurisdiction in determining that question; and,

(b) If the question of bona fide operation is before this Court then its holding that petitioner was violating a Texas Statute is obviously erroneous and contrary to *Railroad Commission v. Bates*, 108 S. W. (2d) 286, and other cases cited.

If McDonald has violated any Texas statute and is guilty of crime, *then what statute?* This Court quite casually convicts him as a law violator. *What law has he violated?*

This Court's opinion completely writes out of the Federal Act the language "*and if such carrier was registered on June* 1, 1935, *under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate.*" Isn't it fair and reasonable to assume that if Congress had intended to make compliance with some supposed state law a prerequisite to bona fide operation that it would have used appropriate language to that effect rather than referring to registration under a code of fair competition?

This Court writes out of the Act the language of Congress and engrafts a condition of its own making.

This Court writes out of the statute the plain, unambiguous language of Congress that "*if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect,*" that "*Pending the determination of any*

such application the continuance of such operation shall be lawful," and substantially substitutes a provision of its own choosing (contrary to the act of Congress) to this effect *"If applicant file an application with the Commission within one hundred and twenty days and shows compliance with state statutes, whether such statutes infringe the Commerce Clause of the Federal Constitution or not, pending the determination of any such application the continuance of such operation shall be lawful."*

That is not what Congress, which was familiar with state laws, provided and is it not fair and reasonable to assume that had Congress intended to make compliance with any supposed state law a condition requisite that it would have here made reference to such state laws as it did do in at least two other instances in the Motor Carrier Act, 1935, but here wholly failed to do.

Under any rule of statutory construction the naming of "registration under any code of fair competition," excluded the idea of compliance with some supposed state law.

Under every rule of statutory construction a court must endeavor to give effect to every word, phrase, clause, and sentence of an Act. A court is not authorized to write language of an Act entirely out where constitutional effect may be given to it as is quite simple here. Neither is a court justified nor may it, substitute its own judgment for the conditions and provisions of a statute for that of the Congress.

Please do not convict a good citizen of Texas of "defiance of its laws" and sentence him to bankruptcy without answering the questions.

(a) If McDonald defied or violated any law of Texas, *then what law?*

(b) If the State of Texas can pass a law requiring "certificates of convenience and necessity" or other form of "permit" of an exclusive interstate operator, *has it done so?*

(c) If the question of bona fide operation is before the Court, *how did it get there?* Especially when the *original exclusive jurisdiction is given to the Interstate Commerce Commission,* where the application is now pending, *both under the statute and your own decisions.*

May we earnestly discuss the obvious errors assigned under the following specific grounds or propositions of error.

GROUND NO. I

The question of "bona fide operation" is distinctly one of fact. The original exclusive jurisdiction to determine such fact question is committed to the Interstate Commerce Commission under the Motor Carrier Act, 1935. Obviously it is error for this Honorable Court to assume original jurisdiction to determine this issue contrary to the statute and deprive the Interstate Commerce Commission of its original statutory jurisdiction and this petitioner the right of obtaining a finding and adjudication by the body of original

jurisdiction. Briefly stated, this Honorable Court has overreached its original jurisdiction.

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Atlantic Coast Line Ry. Co. v. Hampton, 80 Fed. Supp. 797.

GROUND NO. II

The Supreme Court of Texas, followed by the Court of Civil Appeals of Texas, having construed the Texas statute and held that operators similarly situated to petitioner were in "bona fide" operation and entitled to continue to operate until the Interstate Commerce Commission should otherwise order, in spite of the Texas statutes, and having refused to hold that such an operator as petitioner was operating in "defiance" of Texas law is necessarily binding upon the Federal Courts.

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Price v. Illinois, 238 U. S. 446, 35 Sup. Ct. 892.
Sage v. Baldwin, 55 Fed. (2d) 968.

GROUND NO. III

The Texas truck law does not now, and has never required, that petitioner have a so-called State Interstate Certificate of Convenience and Necessity, nor any other kind of permit, and any such construction makes the Texas statute unconstitutional. Petitioner has not therefore operated in "defiance of any law of this State."

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Williams v. Standard Oil Co., 278 U. S. 235, 49 Sup. Ct. 115, 60 A. L. R. 596.

We beseech of each member of this Court a careful reading of our supporting brief under each ground of error.

WHEREFORE, your petitioner respectfully prays that this motion for rehearing be granted and that upon reconsideration of this cause that the judgment of the Circuit Court of Appeals be overruled and that the judgment of the trial court herein be in all things affirmed.

Respectfully submitted,

T. S. CHRISTOPHER,
Counsel for Petitioner.

PRICE AND CHRISTOPHER,
LLOYD E. PRICE,
Of Counsel.

I, T. S. Christopher, in compliance with Rule 30 of the Supreme Court, do hereby certify that the foregoing petition for rehearing was filed in good faith and not for delay, and in an earnest belief that the court has erroneously determined this cause requiring further consideration.

T. S. CHRISTOPHER,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1937

No. 1052

A. E. McDONALD, *Petitioner*

vs.

ERNEST O. THOMPSON, ET AL.

Brief in Support of Motion For Rehearing

To the Honorable The Supreme Court:

Now comes the petitioner, A. E. McDonald, and earnestly submits this brief on petition for a rehearing in a sincere, honest challenge of the manifest error of this Court's opinion and judgment, earnestly hopeful that this Court shall give its ear and attention:

PRELIMINARY STATEMENT

This Court in holding that McDonald was operating in violation of Texas law in June, 1935, and was therefore not a bona fide operator within the proviso of the Federal Act of 1935 is wrong for three distinct reasons:

(a) The holding that McDonald was violating a Texas statute is exactly contrary to the following Texas decisions which have interpreted the Texas

statutes: *Sage v. Baldwin*, 55 Fed. (2d) 968; *Railroad Commission v. Bates*, 108 S. W. (2d) 286; and *Southwestern Greyhound Lines, Inc., v. Railroad Commission of Texas*, Supreme Court of Texas, 99 S. W. (2d) 268. The Bates case and other Texas decisions like it hold squarely that persons in exactly the same status as McDonald, who were operating without a state certificate on June 1, 1935, were not only not violating a law but were entitled to permanent injunctions against respondents restraining interference with their purely interstate business. Such Texas decisions construing Texas law should be binding on this Court.

(b) The question of McDonald's bona fide operation is not before this Court in this case for the reason that such exact question is now pending and undetermined in the Interstate Commerce Commission where McDonald's grandfather application is pending.

(c) The record here conclusively shows that McDonald, a purely interstate operator, has complied with all requirements of Texas save and except he has not obtained a state interstate certificate and the Texas law does not require and has never required him to have such a certificate. The fact that the Court of Civil Appeals at Austin dissolved McDonald's injunction obtained before the Federal law was enacted does not brand McDonald as a law violator for the reason that after enactment of the Federal statute McDonald no longer needed a state injunction restraining respondents from arresting his drivers for not having a state interstate certificate which was

not required of him under Texas law. Again the record affirmatively discloses that McDonald's original injunction in the state court at Austin was not effectively dissolved until after he (McDonald) obtained an injunction in the Federal Court at Fort Worth on which this case is based. Assuredly, this Court is wrong in saying that McDonald was a law violator and not in good faith for not having a state interstate certificate when under Texas law, as properly construed, he was not required to have such a certificate even before the Federal Law was enacted.

Again respondents, as state officers, should not be permitted to arrest McDonald's drivers and put him out of business on the ground that he does not come within the grandfather clause until the Interstate Commerce Commission has had an opportunity to pass on the question of his bona fide operation. The exact effect of the decision of this Court in this case is to determine prematurely the merits of McDonald's grandfather application now pending in the Interstate Commerce Commission before that Commission has had an opportunity to pass on it and before there has been any appeal from any decision of the Interstate Commerce Commission on McDonald's application to the Federal Courts.

Even before the State Supreme Court of Texas in *Southwestern Greyhound Lines, Inc., v. Railroad Commission of Texas*, 99 S. W. (2d) 263, held that the Federal Motor Carrier Act of 1935 superseded state legislation except as to local police measures and even before it was held by the Austin Court of Civil Ap-

peals in *Rail oad Commission of Texas v. Bates*, 108 S. W. (2d) 286, that just such a person as McDonald was not required to have a state interstate certificate as a condition precedent to grandfather operation under the Federal Act, a Texas three-Judge Federal Court in 1932, and long before the enactment of the Federal Act of 1935, in interpreting the Texas Motor Carrier law, held in terms that a purely interstate motor carrier did not have to have a state interstate certificate of convenience and necessity, in order to operate. The error of this Court's decision, simply stated, in this: That the respondents are not asserting their right to arrest the drivers of McDonald on the ground that he is violataing some rule of safety promulgated by the Railroad Commission of Texas, or that he has violated some police measure, rule or regulation.

Respondents are asserting their right to arrest McDonald's drivers and stop his operation solely on the ground that he does not have from respondents a state interstate certificate of public convenience and necessity. Under this record there is utterly no ground for saying that McDonald has violated any law in Texas other than the ground asserted by respondents that he (McDonald) is and has been a law violator for the simple reason that respondents have never given him *authority* or *permission* to operate in interstate commerce; and under the authorities there simply is no statute in Texas authorizing respondents to exact a state interstate certificate from McDonald other than the decision of the Circuit Court

of Appeals in this case. The doctrine of dual certificates promulgated by the Circuit Court of Appeals in this case is the same doctrine promulgated by the Court of Civil Appeals at Austin in the case of *Railroad Commission of Texas v. Southwestern Greyhound Lines, Inc.*, 92 S. W. (2d) 296, and this decision of the Austin appellate court was expressly reversed by the Supreme Court of Texas on appeal in *Southwestern Greyhound Lines, Inc., v. Railroad Commission of Texas*, 99 S. W. (2d) 263.

This Court apparently is laboring under the view that McDonald has violated some rule of the Commission with reference to safety or condition of roads promulgated by it. This is not true. The only thing McDonald has done which the Commission condemns is that he has received no certificate of convenience and necessity from it (the only certificate it is authorized to issue) and we assert earnestly and insistently that no authority is given to the respondent Commissioners by any statute in Texas whatsoever to exact from McDonald a certificate authorizing him to operate in interstate commerce.

We again emphasize that in our view this Court should not prematurely, in a matter of complicated administrative law, pass finally on the question of McDonald's bona fide operation until the Interstate Commerce Commission, to whom that exact question has been entrusted by Congress in the first instance, shall have an opportunity to pass on that matter. But if this Court thinks the question of McDonald's bona fides is a law question and is properly before

this Court in this case, nevertheless we assert that this Court in branding McDonald as a law violator is making such decision exactly contrary to the decisions of the Austin Court of Civil Appeals in *Railroad Commission v. Bates*, supra, which decision followed the construction of the Texas Motor Carrier law in the Supreme Court in *Southwestern Greyhound Lines, Inc., v. Railroad Commission*, supra. In a word, we assert that this Court in order to brand McDonald as a law violator and as not being in good faith is forced to hold this because he has no state interstate certificate when our own high courts in Texas say in exactly similar cases that he is not by law required to have such a certificate.

In order for this Court to hold McDonald a law violator, it must under this record approve the remarkable doctrine of the New Orleans Court that an interstate operator must have authority and permission of both state and nation to operate at all. That he must have two certificates of authority. *No question is presented here of the general authority of a state to enact police measures for the protection of state highways applicable alike to intra and interstate operators.* All such measures in existence in Texas have been obeyed to the letter by McDonald.

GROUND NO. I

The question of "bona fide operation" is distinctly one of fact. The original exclusive jurisdiction to determine such fact question is committed to the Interstate Commerce Commission under the Motor Carrier Act, 1935. Obviously it is error for this Honorable Court to assume original jurisdiction to determine this issue contrary to the statute and deprive the Interstate Commerce Commission of its original statutory jurisdiction and this petitioner the right of obtaining a finding and adjudication by the body of original jurisdiction. Briefly stated this Honorable Court has overreached its original jurisdiction.

AUTHORITIES

Great Northern Ry. Co. v. Merchant's Elevator Co., 259 U. S. 285, 42 Sup. Ct. 477.

Abilene Cotton Oil Co. v. T. & P. Ry. Co., 204 U. S. 426, 27 Sup. Ct. 350.

B. & O. Ry. Co. v. Pitcairn, 215 U. S. 481, 30 Sup. Ct. 164.

Mitchell Coal Co. v. Pennsylvania Ry. Co., 230 U. S. 247, 33 Sup. Ct. 916.

Morrisdale Coal Co. v. Pennsylvania Ry. Co., 230 U. S. 304, 33 Sup. Ct. 938.

Northern Pacific Ry. Co. v. Solum, 247 U. S. 477, 38 Sup. Ct. 550.

Director General v. Viscose Co., 254 U. S. 498, 41 Sup. Ct. 151.

United States v. Pacific & Artic Co., 228 U. S. 87, 33 Sup. Ct. 443.

Dayton Goose Creek Ry. Co. v. U. S., 263 U. S. 456, 44 Sup. Ct. 169.

Texas & Pacific Ry. Co. v. Gulf, C. & S. F. Ry. Co., 270 U. S. 266, 46 Sup. Ct. 263.

United States v. Illinois Central R. Co., 291 U. S. 457, 54 Sup. Ct. 471.

Atlantic Coast Line Ry. Co. v. Hampton, 80 Fed. Supp. 797.

STATEMENT

Section 204, Subsection (6), Motor Carrier Act, 1935, under "General duties and powers of the Commission," provides:

> (6) "To administer, execute, and enforce all other provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; and"

Section 205 (F) provides:

> (f) "In accordance with rules prescribed by the Commission, reasonable notice shall be afforded, in connection with any proceeding under this part, to interested parties and to the board of any State, or to the governor if there be no board, in which the motor-carrier operations involved in the proceeding are or are proposed to be conducted, and opportunity for hearing and for intervention in connection with any such proceeding shall be afforded to all interested parties."

Sections 206 and 207 authorize the Interstate Commerce Commission to prescribe forms on which appli-

cations shall be made and the Act throughout shows that the Commission may require such proof of "bona fide operation" as it may think necessary, and the Commission has prescribed forms and required proof, having held thousands of hearings on this very point.

McDonald filed his application (T. R. 36) and the same is now pending. (Report and Recommended Order of Joint Board 16 in M. C. 80, 415 and I. C. C. Brief page 17.) It will not be disputed that the Railroad Commission of Texas appeared and contested the "bona fide operation" of McDonald at the hearing before Joint Board 16. There has been no final determination of that issue by the Interstate Commerce Commission.

ARGUMENT

The term "bona fide" as defined by the courts simply means "without fraud, collusion, or deception." 8 *C. J.* 1145.

Bouvier's Law Dictionary, Vol. 1, defines the term "bona fide" as follows:

> "Good faith, honesty as distinguished from mala-fides (bad faith)."

Webster's New International Dictionary defines the term "Bona fide" as:

> "In or with good faith; without fraud or deceit; real or really; actual or actually; genuine or genuinely; as to act bona fide; a bona fide transaction."

This Court itself, in disposing of this case in its opinion of December 5, 1938, used the language:

> "The expression 'in bona fide operation' suggests *absence of evasion, includes the idea that mere ability to serve* as a common carrier is not enough, *includes actual rather than potential or simulated service.* * * *"

Practically each expression in the quotation implying that a proper determination of the phrase "in bona fide operation" *requires a finding of fact.*

If the term "bona fide" simply means good faith, honesty, as distinguished from malafides, then the question of "bona fides" is a question of motive or intent, *such questions involving findings of fact.*

The Interstate Commerce Commission in the Slagle case, 2 M. C. C. 12, in making a determination of the question of the bona fides of Slagle's operation, said:

> "The question, as we see it, is of fact rather than of law. Were the operations openly conducted without any element of pretense, disguise, or concealment, and in such a manner as to indicate a real intent to conduct and maintain a transportation business? Operations so conducted are the bona fide operations contemplated by the Act."

It seems to us that there can be no question but that what is or is not a "bona fide operation" is purely a question of fact and that the exclusive original jurisdiction to determine this fact question has been first committed to the Interstate Commerce Commission; that this Court under the authority cited here-

inabove is without jurisdiction to determine the question of "bona fide operation" in McDonald's case until such time as the administrative body, to whom the original exclusive jurisdiction has been committed by the Motor Carrier Act, 1935, has first made such a determination, and that the only possible manner in which such a question could be before this Court, or any other court, would be upon a direct appeal from an order of the Interstate Commerce Commission upon such finding.

We understand perfectly well that where there is nothing but a question of law to be determined that it is not necessary to resort to the Interstate Commerce Commission, but it is equally well settled by the decisions of this Court that where there are questions of fact involved that resort must be first had to the Interstate Commerce Commission and that the courts are without jurisdiction to determine such fact issues until the administrative body or commission has first passed upon the question. The Interstate Commerce Commission has not yet finally acted in the McDonald case. The application is still pending before that Commission.

After the filing of McDonald's application before the Interstate Commerce Commission, the respondents in this Court filed with the Interstate Commerce Commission what is there termed a protest to the granting of McDonald's application and the issuance to him of a certificate, *and raised identically the same question before that administrative commission which the respondents have attempted to raise in this Court,*

and upon which this Court determined this case. The Interstate Commerce Commission, through its Joint Board No. 16, as constituted under the Act, issued a favorable report and recommended order holding that the majority of the routes applied for by McDonald were being operated in a bona fide manner by McDonald on June 1, 1935, and continuously since. The respondents here likewise filed a brief involving this identical question before the Interstate Commerce Commission in the Slagle case, supra, which case was determined adversely to their contention.

Undoubtedly the question of what is a "bona fide operation" is a question of fact. Questions of honesty, fraud, and deception are always questions of fact. The Court used the language, "absence of evasion" which is certainly a question of fact. This Court used the words "actual rather than potential or simulated service," which beyond any doubt implies findings on questions of fact. If we are correct in our contention, that what is or is not a "bona fide operation" is first a question of fact, then under the authorities cited hereinabove this Court is without jurisdiction to determine this case in the manner in which it has determined it, and we verily believe that this Court will set its former opinion aside, which we most earnestly pray that it do, and hold that under the proviso of Section 206, Motor Carrier Act, 1935, that the trial court was correct in issuing its permanent injunction and that the petitioner is entitled to continue to operate until such time as the Commission shall otherwise order, that being the language of the statute.

If the question of the "bona fides" of petitioner's operation is before the Court, which we do not see how it possibly could be, then this cause merits the further earnest consideration of this Court, especially in view of the opinion of this Court in which this Court in *Ware v. Hylton*, 3 Dallas 199, 1 L. Ed. 568, in which this Court, in construing the term "bona fide" when used in a statute said:

> "Bona fide is a legal, technical expression and the law of Great Britain and this country has annexed a certain idea to it. *It is a term used in statutes in England and in acts of Assembly of all the states and signifies a thing done really, with good faith, without fraud or deceit or collusion or trust.*"

Undoubtedly that is all the phrase means as used in the Motor Carrier Act, 1935, and if so this Court is manifestly in error in making the determination which it has of this case, and, in fact, in making any determination of this case on this particular point for the very obvious reason that fraud or deceit or collusion or trust involves a state of mind and the finding of questions of fact.

Will the Court please ask itself: What happens to the language in Sec. 206 "and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate?"

It is clear to us that if a carrier was in "bona fide"

operation on June 1, 1935, only as it may have been operating under authority from the state, the quoted language had as well be deleted from the statute; for, if as a matter of law, because the petitioner had not received authority from the Railroad Commission (and he was not so required) he was not, therefore, as this Court has said in bona fide operation, then the provision with reference to registration under any code of fair competition becomes wholly immaterial.

Yet Congress provides that that fact shall be considered in arriving at the determination. *This Court's determination is utterly inconsistent with this provision of the statute.*

Furthermore, if the petitioner was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes, or within the territory for which application is made and has so operated since that time, he is entitled to a certificate without the Commission's "requiring further proof that public convenience and necessity will be served by such operations, and without further proceedings" if application be filed within the time required as fixed by the statute.

However, petitioner is given a further right in the section *which flows from the mere fact of filing the application*, namely, "pending the determination of any such application the continuance of such operation shall be lawful."

These provisions to our minds makes it conclusive that the Interstate Commerce Commission has exclu-

sive original jurisdiction to determine whether the applicant should be given a certificate under the "grandfather clause." *The point is:* Congress itself specified a certain result which would flow from the mere filing of the application, namely that "pending the determination of any such application, the continuance of such operation shall be lawful." *The decision in this case is utterly inconsistent with this provision and nullifies that language of the statute.*

May we remind this Court that in *Coffin v. United States*, 162 U. S. 664, 16 Sup. Ct. 943, this Court said:

> "The expression 'Bona fide' was used in the sense of 'real' and 'actual'."

We most earnestly invite this Court's attention to the decision of the Interstate Commerce Commission in the Slagle case, supra, which was considered and reconsidered by the Interstate Commerce Commission both on oral argument and upon brief after literally dozens of interested parties, including many state commissions, and the Texas Railroad Commission, had intervened and presented briefs and arguments, and in which the Interstate Commerce Commission said:

> "Prior to the passage of the Act, most of our states had undertaken to regulate to some extent motor carriers engaged in intrastate commerce, and some had undertaken to extend the regulation in various respects to those engaged in interstate or foreign commerce. There were a great variety of such laws and like variations in

enforcement. Enforcement was vigorous in some states and lax in others, and, as was natural, laxity was more prevalent as to interstate operations. In the absence of Federal regulations, the situation was a most difficult one for the states, which was one of the reasons why their regulatory authorities very generally favored such regulation. The records show that Congress was fully informed in regard to this situation. It might readily, in clear and unmistakable language, have made compliance with state laws a pre-requisite to rights under the 'grandfather' clauses, and have indicated how we should determine the fact of compliance or non-compliance. This, however, it did not do. Instead, it employed the phrase '*bona fide* operation,' making registration 'under any code of fair competition,' evidence of such operation on June 1, 1935, *but saying nothing about state laws*, which were not mentioned in committee reports or debates in connection with the phrase '*bona fide*' operation.

"*At two places in the Act, Congress made specific provision for compliance with state laws as a prerequisite to obtaining a privilege.* Under section 203 (b) (8) a carrier of passengers is not entitled to an exemption that he might otherwise be accorded unless he is 'lawfully engaged in the intrastate transportation of passengers in accordance with the laws of each state having jurisdiction.' Under Section 206 (a) a carrier who has procured a certificate under state laws authorizing intrastate common carrier service is relieved of the requirement of making proof of public convenience and necessity for conducting the same operations in interstate commerce. It seems unlikely that if Congress had intended to

make compliance with State laws a condition precedent to 'grandfather' privileges, it would have failed to make the same specific provisions that it did in respect to other privileges.

"It seems clear that protestants' interpretation of the Act would, in substance and practical effects, require the exercise on our part of judicial functions in respect of state laws. That is to say, in the absence of either admission by an applicant of law violation or proper proof of conviction of violation in a court of competent jurisdiction, the responsibility of determining the matter would be upon us. The Act makes it a prerequisite to a grant of a certificate or a permit under the 'grandfather' clauses, not only that appellant was 'in bona fide operation' on the date specified, but also that it 'has so operated since that time.' It follows that, in the absence of admissions or convictions, it would be necessary for us to examine into the conduct of an applicant with reference to applicable state laws over a period of time, which might be long. To determine the fact of compliance or non-compliance, it would be our responsibility, first, to ascertain what the state law is; second, to construe that law; and third, to apply it as construed to the facts of the case. The responsibility to determine whether a law has been violated would also, presumably, carry with it a responsibility to determine whether the law itself is valid, for a statute without legal force could not operate to penalize one who failed to comply therewith. Protestants refer us to no provision of the Act which would imply that we have such broad responsibility and authority in the inter-

pretation and application of state statutes, and we find no such provision.

"What might often be involved in such a task is well illustrated by applicant's situation here with respect to the law of Iowa. Whether or not the applicant violated the law of that state is dependent, for one thing, upon whether he was a contract carrier or a common carrier. At the time he began operations in Iowa, he thought that he was a contract carrier, and he was still of that opinion when he filed his application with us under the 'grandfather' clause. We have found that under the definitions in the Act he was and is a common carrier, but whether he was and is such a carrier, rather than a contract carrier, under the statutes of Iowa is another matter. It would require careful consideration of those statutes and interpretation of their provisions. If applicant actually was, under the Iowa law, what he believed himself to be, namely, a contract carrier, he did not violate the law of that state; and at no time prior to this proceeding, apparently, did the state authorities undertake to question his status in this respect.

"Moreover, where the fact of noncompliance with state laws is admitted by an applicant or properly proved to us, we cannot accept protestants' contention that this fact alone requires denial of an application under the 'grandfather' clause. The words 'bona fide' *certainly makes it necessary to consider also the mental attitude of the offender, for where good faith is involved, the maxim 'ignorance of the law is no excuse,' loses its force.* We cannot ignore the facts that it has sometimes been difficult for motor carriers to keep fully informed in regard to the require-

ment of state laws, that some states have permitted rather general disregard of certain requirements, and that operators might in good faith challenge the validity of some state statutes affecting interstate commerce. It has for example, been held repeatedly that a state cannot prohibit or obstruct interstate transportation by motor vericles on the ground that the existing similar facilities are adequate. *Buck v. Kuykendall*, 267 U. S. 307; *Bush v. Malloy*, 267 U. S. 317; *Sprout v. South Bend*, 277 U. S. 163. *Nor, presumably, can a state accomplish the same result through indirection by assuming to base its action on other and valid grounds but which the facts do not actually support.*

"In the light of the reasons stated for believing that Congress could not have intended the interpretation of the law urged upon us by protestants, the lack of any clear delegation of authority and responsibility to try in this connection the question of whether state laws have been violated and the circumstances under which various failures to comply with state laws may have occurred, we conclude that the fact that an applicant under the 'grandfather' clause has not complied with state laws is not by itself sufficient to bar his right to authority under that provision of the Act.

"Protestants argue vigorously against this conclusion, and urge that it amounts to condoning and encouraging violations of the laws of the states, that it leaves the states without any effective method of preventing persistent violators of their laws from obtaining authority to operate within their borders in interstate or foreign commerce, and that for these reasons it is incon-

sistent with that portion of the declaration of the policy of Congress in section 202 (a) wherein cooperation 'with the several states and the duly authorized officials thereof' is required. However, for reasons next discussed we cannot agree that our conclusion herein will have the effect which protestants suggest.

"To the extent that state laws are properly applicable to interstate operations they can be enforced by the states, and we can assume that they have been and will be so enforced. Infractions do not, of course, always concern the right to operate. However, in considering the action of the states in enforcement of certain classes of their statutes, the courts have sustained repeatedly their right to forbid operations within their borders in interstate or foreign commerce until such time as compliance with such laws has been effected. In the event of the failure of an operator to comply with such state statutes, the states have the power to stop his operations, and it is a reasonable assumption that in proper cases they have exercised in the past, and in the future will continue to exercise, such power, Our conclusions in this or any other proceedings cannot affect this right of the states.

"Having determined that 'bona fide' as used in the Act does not mean that an operator must prove compliance with state laws in his operations, there remains for consideration the reasonable interpretation which is to be placed upon this language. The Latin words 'bona fide' mean 'in good faith.' Webster's New International Dictionary defines 'bona fide' as 'in or with good faith; without fraud or deceit; real or really; actual or actually; genuine or genuinely.' As

defined in Black's Law Dictionary, the words mean 'in or with good faith; honestly, openly and sincerely; without deceit or fraud.' The Supreme Court in *Ware v. Hylton*, 3 U. S. 199, 241, defined them as follows:

> 'Bona is a legal technical expression; and the law of Great Britain and this country has annexed a certain idea to it. It is a term used in statutes in England, and in Acts of Assembly of all the states, and signifies a thing done really, with a good faith, without fraud, or deceit or collusion, or trust.'

"The Supreme Court of the State of Washington in *State ex rel Great Northern Ry. Co. v. Dept. of Public Works*, 219 Pac. 878, considered an appeal from an order of the Department of Public Works granting a certificate of convenience and necessity to a certain motor carrier. The application was granted upon the ground that the carrier 'was actually operating in good faith over the route on January 15, 1921,' that date being the statutory date determining rights under the grandfather clause in the State Act. The Court said:

> 'As we read the Act, the particular provision now under consideration was intended to give a preference right to all operators in good faith, who had been operating without knowledge that the Legislature would so act, and to deny a preference right to those who, after the Legislature began the consideration of the subject, in bad faith commenced to operate for the purpose of forestalling the legislative action.'

"We are clear that one purpose of the use of

the words 'bona fide' operation was to deny rights under the grandfather clauses to those who, with knowledge of the impending legislation, should make a show of commencing operations, not in pursuance of any well-conceived plan of furnishing transportation service, but for the purpose of thereby securing rights to operate having in themselves a money value. The words may properly be given an even broader application to exclude operations conducted surreptitiously or in disguise or involving some other element of pretense or concealment for the purpose of preventing state authorities from having the opportunity of enforcing statutory requirements.

"The question, as we see it, is of fact rather than law. Were the operations openly conducted without any element of pretense, disguise, or concealment and in such a manner as to indicate a real intent to conduct and maintain a transportation business? Operations so conducted are the 'bona fide' operations contemplated by the Act."

It would be impossible for us to add anything to what the Interstate Commerce Commission has said.

We do point out, however, that under the Texas Motor Truck Law McDonald was not required to have anything at all except, that if the Texas law is applicable under its terms to an interstate operator (which it cannot be) then under the provisions of Section 3 of said act, it is required that if he operate as a common carrier motor carrier for hire that he have a certificate of convenience and necessity in the following language:

> "Without first having obtained from the Commission * * * a certificate of public convenience and necessity *pursuant to a findnig to the effect that public convenience and necessity require such operation.*"

The Railroad Commission of Texas disclaimed any contention that your petitioner had to have any such instrument as the statute required. It is well that the Railroad Commission of Texas should make such a disclaimer because the proposition is so well settled that it is not now debatable that the state did not have any such power. *Buck v. Kuykendall*, 267 U. S. 307; *Bush v. Malloy*, 267 U. S. 325; *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570; *Smith v. Calhoon*, 75 L. Ed. 812, as well as the *Sage v. Baldwin* case hereafter cited.

The contention of the Attorney General in this case on behalf of respondents with reference to the bona fides of McDonald's operation and the determination by this Court must necessarily involve numerous inquiries which obviously this Court has not considered, but which this Court necessarily must consider in justice to petitioner if the cause is to be determined upon the proposition that petitioner was operating "in defiance of the law."

Some of the inquiries which this Court would necessarily be required to consider would be, did petitioner actually operate in violation of the law of the State of Texas? The Court has only inferentially determined that question by apparent mere assumption because such an inquiry and such a determination

would involve the further inquiry of, first, what do the laws of Texas require, and, second, did petitioner meet these requirements. It must necessarily involve the inquiry, *did the laws of the State of Texas apply to petitioner's business—that of a common carrier, motor carrier engaged exclusively in interstate commerce.* If this question be answered in the affirmative, then another inquiry would arise, and which was in fact the occasion for this lawsuit, and that is, are such laws consistent with the commerce clause of the Federal Constitution. All of these inquiries must be quite pertinent and obviously the opinion of this Court goes around answering any such inquiries, but they must be determined in order to reach a proper determination of this cause.

If this case is to be decided, however, upon the question of bona fides of petitioner's operation, which at this time is without the jurisdiction of this Court, but if it is to be so decided, then still that does not depend upon whether McDonald's operation was *legal* and *lawful.*

As pointed out by the Interstate Commerce Commission in the Slagle case, supra, if Congress had intended to make compliance with state laws a prerequisite to the issuance of a certificate under the grandfather clause it would undoubtedly have used appropriate language which it utterly failed to do.

We have heretofore cited this Court's holding in *Ware v. Hylton*, supra, as well as in *Coffin v. United States*, supra. May we call attention to the fact that in the various editions of "Words & Phrases" numer-

ous cases are cited wherein the term "bona fides" is construed in its use as an adjective. Thus the term "bona fide claimant," "bona fide entryman," "bona fide guest," etc., simply means "actual" or "real." In *Stephens v. Union Grade School District No. 2*, 275 Pac. 1056, the Court held that "bona fide residence" means actual residence.

In *People v. Smith*, 295 Pac. 105, the court held that "bona fide sale" means an actual sale.

In *Weaver v. Ann Arbor Ry. Co.*, 102 N. W. 1937, the court held that "bona fide employee" as used in connection with a drover's pass simply meant a person actually in charge of livestock.

Under the foregoing authorities, we submit that petitioner was *really* in operation, *actually* in operation, *genuinely* in operation, and was operating in *good faith*, in *all sincerity*, without *make-believe*, and *without fraud, deceit, collusion or trust*, and demonstrates that petitioner was in bona fide operation on June 1, 1935.

The legislative history of an act must have some bearing and be given some consideration in the construction of the act, or in the meaning to be given to words used therein. In this connection we beg permission of the court to refer to the Interstate Commerce Commission report in Motor Bus and Motor Truck Operation, 140 I. C. C. 685, where the Commission, in discussing the question of motor bus and motor truck legislation and the matter of "grandfather clauses" in state statutes, said:

"In some states the regulatory laws provide that a motor carrier *actually* in operation on a certain date and continuously after that date and at the time of application is entitled to a certificate upon filing application and showing that its operation on and subsequent to that date was in *good faith*. Such a provision is sometimes referred to as a 'grandfather' clause. In other states there is no such provision.

"It is only fair that the interests of motor carrier operators who have pioneered and have operated their property successfully should be protected and the fact that an applicant for a certificate of convenience and necessity has been in *bona fide* operation continuously for a reasonable period prior to the enactment of regulatory legislation and at the time application is made for a certificate should be considered prima facie evidence as to the convenience and necessity of such operation." (Emphasis ours.)

The Commission's conclusion (No. 12) was that:

"The law should provide that the fact that an applicant for a certificate of public convenience and necessity was in *bona fide* operation as a common carrier over the route or between the termini described in the application at least one year prior to the first day of the legislative session in which such law is enacted and since then, and at the time application is made has been continuously in operation should be considered prima facie evidence as to the public convenience and necessity of such operation." (Emphasis ours.)

Likewise, in *Co-ordination of Motor Transporta-*

tion, 182 I. C. C. 263, speaking of the same subject, the Commission said:

> "The laws of some states provide that a motor carrier *actually* in operation on a certain date and continuously between that date and the date of application is entitled to a certificate of convenience and necessity upon filing an application and showing that the operation was in *good faith*. Other states have no such provisions, and all applicants for certificates, whether they have been in operation over a stated period prior to the enactment of legislation or have not yet commenced operation, are placed on the same footing.
>
> "The fact of continuous *bona fide* operation for a reasonable period prior to the enactment of regulatory legislation and at the time of the application for a certificate is considered evidence, conclusive or prima facie, as the case may be, as to the existence of public convenience and necessity." (Emphasis ours.)

Accordingly, the Commission recommended to Congress:

> "That certificates should be issued as a matter of course to *bona fide* operators who have been in business for a stated length of time prior to the effective date of the regulatory act, provided they comply with all other applicable provisions of the Act." (Emphasis ours.)

From the foregoing quotations it will be noted that the Commission was using the terms "bona fide" and "in good faith" interchangeably and both terms in the sense of *actual*.

Any remaining doubt of the Commission's understanding of the term "bona fide operation" is removed when recourse is had to the hearing before the sub-committee of the House Committee on appropriations, where the Commission was seeking an appropriation for the Bureau of Motor Carriers (R. pp. 37-56). Commissioner Eastman, speaking as Chairman of Division 5, the Motor Carrier Division, said:

> "The first section which is mentioned in the chart is called the section of certificates. Every common carrier has to have a certificate of convenience and necessity; every contract carrier must have a permit, and every broker a license. At the start, they are covered by what is called the 'grandfather clause.'. In other words, the men in operation on a certain date are entitled to certificates or permits automatically; but they must have been in *bona fide* operation on the routes designated in their applications. Therefore, it will be necessary to check up the statements and determine whether they were *actually in operation* on such routes on that date. Afterward, the motor carrier law requires hearings to determine if further operators are entitled to certificates or licenses to meet public convenience and necessity." (Emphasis ours.)

It should be borne in mind that many of the recommendations made by the Commission to Congress were incorporated bodily into the Motor Carrier Act, 1935.

When the Motor Carrier Act, 1935, was being considered by the House of Representatives, Mr. Sadow-

ski, a member of the House, was explaining the various provisions of the Bill to the other members of Congress. He said:

> "Section 206 provides for certificates of public convenience and necessity for common carriers giving to all common carriers in operation prior to June 1, 1935, certificates *as a matter of course.*" (Congressional Record, Wednesday, July 16, 1935, p. 12-685.) (Emphasis ours.)

A little later the following colloquy occurred between two other members of the House:

> "Mr. White. Then a certificate of necessity and convenience will be in the nature of a franchise to use the roads to the exclusion of those who have no such certificate.
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And in this connection further, may we refer to *Bowers v. Max Kaufman & Co.*, 18 Fed. (2d) 69, where the Circuit Court of Appeals for the Second Circuit construed the term "bona fide payment" and held that it means "actually, sincerely, and in good faith paid," the court saying:

> *"It is not necessary to hold that it means moneys legally paid in. If so, Congress would have used the phrase, legally paid in."* (Emphasis ours.)

This Honorable Court, in its opinion, in referring to that portion of Section 206, Motor Carrier Act, 1935, which reads:

> "Pending the determination of any such application the continuance of such operation shall be lawful,"

has said:

> "Plainly, the proviso does not extend to one operating as a common carrier on the public highways of a state in defiance of its laws."

May we most respectfully express a slight degree of surprise and shock that this Court should attribute to petitioner an operation "in defiance" of the laws of the State of Texas when Section 20 of the Motor Truck Law of Texas, Art. 911(b), Revised Civil Statutes, 1925, authorizes an appeal from orders of the Railroad Commission of Texas and authorizes District Courts of Travis County, Texas, to set aside such orders and to grant injunctions. McDonald, the petitioner herein, was following his remedies under the statute in having received a permanent injunction from the trial court and could not assume that the trial court judge acted unlawfully nor erroneously.

The District Courts of Texas are courts of general jurisdiction with general authority to issue injunctions under Art. 5, Section 8 of the Constitution of Texas, and under Art. 4662, Revised Civil Statutes of Texas, 1925.

The Constitution of Texas, by Art. 16, requires a district judge to take the following oath of office:

> "Art. 16, Sec. 1. Members of the Legislature and all officers before they enter upon the duties of their offices shall take the following oath or affrmation: I, ——— do hereby solemnly swear (or affirm), that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ——— according to the best of my skill and ability, *agreeably to the Constitution and laws of the United States and of this State*," etc. (Emphasis ours.)

We do not see what process of reasoning would lead to the conclusion that a district judge of Texas would authorize your petitioner to do anything "in defiance" of the laws of the State of Texas. We do not see how any such unlawful and defiant operation can be ascribed to petitioner without ascribing to the district court of Travis County, Texas, the same unlawfully acts in defiance of the laws of the State of Texas. Such, surely is not the case nor the meaning of this Court in the language which it has used in its decision in this case.

Surely no court would be regarded as authorizing the doing of an act in defiance of the laws of this state, and if so, then the Federal Courts have defied the laws of this State in *Sage v. Baldwin*, 55 Fed. (2d) 968, and in many other cases, including *Galveston Truck Lines v. Railroad Commission of Texas*, 2 Fed. Supp. 488, with the express approval of this Court in 289 U. S. 708, 53 Sup. Ct. 694. We mildly wonder what this Court would say as to the bona fide of the operation of Galveston Truck Lines which has never had a permit or certificate issued by the

Railroad Commission of Texas, but which has operated under an injunction of a Federal Court with the approval of this Court since January 11, 1933.

If the phrase "bona fide" means what this Court has said it does in the case of *Ware v. Hylton*, supra, and as defined by Webster and Bouvier, how is it possible to ascribe fraud, deceit, collusion, or trust to the acts of McDonald in his operation with the express approval of the court under a final and permanent injunction which was just as final and permanent as the trial court could make it, and issued after a final trial on the merits without ascribing some act of fraud or deceit or collusion or trust to the district judge of this state which granted the injunction.

How can this Court so easily conclude that petitioner was operating in defiance of the laws of the State of Texas when Section 17 of the Texas Motor Truck Law, Art. 1690(b), Penal Code of Texas, 1925, Acts 42nd Legislature, 1931, p. 480, Chapt. 277, provides penalties, and Sub-section (c) makes the following provision:

> "(c) Upon the violation of any provision of this Act, or upon the violation of any rule, regulation, order, or decree of the Commission promulgated under the terms of this Act, *any District Court of any county where such violation occurs shall have the power to restrain and enjoin the person, firm or corporation so offending from further violating the provisions of this Act or from further violating any of the rules, regulations, orders and decrees of the Commission.*

> *Such injunctive relief may be granted upon the application of the Commission, the Attorney General or any District or County Attorney.* No bond shall be required when such injunctive relief is sought upon the application of the Commission, Attorney General or any District or County Attorney. Such relief may be granted in suits for penalties as provided in subdivision (b) of this section, but a suit for penalty shall not be a condition precedent to the injunctive relief provided by this subdivision." (Emphasis ours.)

Surely it must be assumed that the Railroad Commission of Texas, the Attorney General of Texas, or some district or county attorney of this state would have performed his duty and have enjoined petitioner if he were operating "in defiance" of its laws. The Attorney General of Texas was present in the trial of petitioner's case in the district court and represented the Railroad Commission of Texas, and he likewise was under a constitutional oath to support and uphold the constitution and laws of this state, and if petitioner's operation was in defiance of the laws of this state, why did he not enjoin McDonald in that proceeding if nowhere else or at no other time? It is easy to say that petitioner was operating in defiance of the laws of this state, but we submit that it is quite difficult to follow that statement up with any logical reasoning which would lead to any such conclusion.

GROUND NO. II

The Supreme Court of Texas followed by the Court of Civil Appeals of Texas having construed the Texas statute and held that operators similarly situated to petitioner were in "bona fide" operation and entitled to continue to operate until the Interstate Commerce Commission should otherwise order in spite of the Texas statute and having refused to hold that such an operator as petitioner was operating in "defiance" of Texas law is necessarily binding upon the Federal Courts.

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The only possible conclusion to be gained from the Bates case, supra, wherein the courts permanently enjoined the Railroad Commission, is that that court was following *Sage v. Baldwin*, supra, which directly held that the Railroad Commission could not require of an exclusive interstate carrier a certificate. It has always been the law of this state since *Sage v. Baldwin* that no certificate could be required of such an operator. The Railroad Commission even disclaims such power.

ARGUMENT

Still this Court, utterly disregarding all issues involved in this case except the issue of "bona fide operation," if that issue be involved, and which is by no means conceded, has chosen to determine this case upon its own construction of the Texas Motor Carrier Law, Art. 911(b), Revised Civil Statutes, 1925, Acts of 42nd Legislature, p. 480, chapt. 277, and held that petitioner was not within the proviso of section 206, Motor Carrier Act, 1935, because he was operating, as this Court says, "in defiance of its laws." Such a determination therefore permits this case to turn wholly upon this Court's construction of the Texas Motor Truck law.

There is a very definite and settled rule, as shown by the authorities cited hereinabove and for which this Court needs no citation of authority, that Federal Courts, including the Supreme Court of the United States, are bound by the construction placed upon state constitutions and statutes by the highest court of that state, and we think that rule applies here. The Supreme Court of Texas, followed in a number of cases by Courts of Civil Appeals of Texas, has placed no such construction as that upon the Texas Motor Truck law. In other words, the Supreme Court says that the petitioner was operating in defiance of the laws of Texas, yet the Texas Supreme Court and Courts of Civil Appeals of Texas have entertained utterly no such view. The construction placed upon the Texas statutes by the Texas courts, including the Supreme Court of Texas, and Courts of Civil Appeals of Texas, is binding, as we view it, upon this Court.

Among the authorities cited hereinabove will be found the *Southwestern Greyhound Lines* case, a case by the Supreme Court of Texas, subsequently followed by the Court of Civil Appeals in the Bates, Futch, Peterson, Williams, and Rayburn cases. Bates, Futch, Peterson, Williams, and Rayburn appealed to state courts for temporary injunctions to protect their operations pending determination of their applications before the Interstate Commerce Commission, and were in identically the same position that your petitioner here is in. That is, they had complied with every law or requirement of the State of Texas ex-

cept *the supposed requirement* that they must have a so-called state interstate certificate of convenience and necessity. The opinions in each of the cases mentioned will bear out this statement.

Being in identically the same position that your petitioner is in, each of those truck operators secured in the courts of Texas, in spite of the Texas Truck law, and after a construction of the Texas law, a permanent injunction against the Railroad Commission of Texas restraining interference by said Commission. Such construction of Texas law by Texas courts, which necessarily must hold that such operators were not operating in defiance of Texas laws, is binding upon this court, and we think should be followed by this court.

Let us bring again to the attention of this Court the proposition that petitioner could not have been operating in defiance of state laws *because it was established by the record in this case that petitioner had met every requirement of the Texas law except that of obtaining from the Railroad Commission of Texas a so-called state interstate certificate. The Railroad Commission of Texas could not require your petitioner to obtain any such certificate and that fact was early made clear in the administration of the Texas Truck Law* in the case of *Sage v. Baldwin*, 55 Fed. (2d) 968, in which Judge Atwell, writing for a three-judge statutory court, assembled under section 266 of the Judicial Code, said:

> "Preserving, therefore, the rights of the state and the right of the nation, the respondents will

be enjoined from interfering with the operation of the complainants or from arresting them for alleged violations of this law, so far as any rates may be concerned, or so far as any bond securing any shipper may be concerned, *or so far as any certificate of public convenience and necessity may be concerned.*" (Emphasis ours.)

Surely the foregoing opinion is clear and emphatic to the effect that the Railroad Commission of Texas cannot require that an exclusive interstate operator obtain from the Railroad Commission of Texas a certificate of public convenience and necessity. Such has been the law of this state since the *Sage v. Baldwin* case. Every other requirement which the Railroad Commission could possibly make of petitioner had been fully met by petitioner as will be shown by the findings of fact of the trial court in this case.

We trust that this Court will give serious consideration to *Railroad Commission of Texas, et al., v. Bates*, 108 S. W. (2d) 286, in which the court, following the Greyhound Lines case, supra, stated the contention of the appellee Bates, as follows:

"Appellee alleged that he has complied with all these provisions of the act *and is entitled to continue operations without a certificate* until his application has been passed upon by the Interstate Commerce Commission; that he has complied with all the rules and regulations over which the Railroad Commission has jurisdiction, and particularly with respect to the character of vehicles to be used and proper safety lights and equipment, and has furnished all kinds of

ous cases are cited wherein the term "bona fides" is construed in its use as an adjective. Thus the term "bona fide claimant," "bona fide entryman," "bona fide guest," etc., simply means "actual" or "real." In *Stephens v. Union Grade School District No. 2*, 275 Pac. 1056, the Court held that "bona fide residence" means actual residence.

In *People v. Smith*, 295 Pac. 105, the court held that "bona fide sale" means an actual sale.

In *Weaver v. Ann Arbor Ry. Co.*, 102 N. W. 1937, the court held that "bona fide employee" as used in connection with a drover's pass simply meant a person actually in charge of livestock.

Under the foregoing authorities, we submit that petitioner was *really* in operation, *actually* in operation, *genuinely* in operation, and was operating in *good faith*, in *all sincerity*, without *make-believe*, and *without fraud, deceit, collusion or trust*, and demonstrates that petitioner was in bona fide operation on June 1, 1935.

The legislative history of an act must have some bearing and be given some consideration in the construction of the act, or in the meaning to be given to words used therein. In this connection we beg permission of the court to refer to the Interstate Commerce Commission report in Motor Bus and Motor Truck Operation, 140 I. C. C. 685, where the Commission, in discussing the question of motor bus and motor truck legislation and the matter of "grandfather clauses" in state statutes, said:

"In some states the regulatory laws provide that a motor carrier *actually* in operation on a certain date and continuously after that date and at the time of application is entitled to a certificate upon filing application and showing that its operation on and subsequent to that date was in *good faith*. Such a provision is sometimes referred to as a 'grandfather' clause. In other states there is no such provision.

"It is only fair that the interests of motor carrier operators who have pioneered and have operated their property successfully should be protected and the fact that an applicant for a certificate of convenience and necessity has been in *bona fide* operation continuously for a reasonable period prior to the enactment of regulatory legislation and at the time application is made for a certificate should be considered prima facie evidence as to the convenience and necessity of such operation." (Emphasis ours.)

The Commission's conclusion (No. 12) was that:

"The law should provide that the fact that an applicant for a certificate of public convenience and necessity was in *bona fide* operation as a common carrier over the route or between the termini described in the application at least one year prior to the first day of the legislative session in which such law is enacted and since then, and at the time application is made has been continuously in operation should be considered prima facie evidence as to the public convenience and necessity of such operation." (Emphasis ours.)

Likewise, in *Co-ordination of Motor Transporta-*

tion, 182 I. C. C. 263, speaking of the same subject, the Commission said:

> "The laws of some states provide that a motor carrier *actually* in operation on a certain date and continuously between that date and the date of application is entitled to a certificate of convenience and necessity upon filing an application and showing that the operation was in *good faith*. Other states have no such provisions, and all applicants for certificates, whether they have been in operation over a stated period prior to the enactment of legislation or have not yet commenced operation, are placed on the same footing.
>
> "The fact of continuous *bona fide* operation for a reasonable period prior to the enactment of regulatory legislation and at the time of the application for a certificate is considered evidence, conclusive or prima facie, as the case may be, as to the existence of public convenience and necessity." (Emphasis ours.)

Accordingly, the Commission recommended to Congress:

> "That certificates should be issued as a matter of course to *bona fide* operators who have been in business for a stated length of time prior to the effective date of the regulatory act, provided they comply with all other applicable provisions of the Act." (Emphasis ours.)

From the foregoing quotations it will be noted that the Commission was using the terms "bona fide" and "in good faith" interchangeably and both terms in the sense of *actual*.

Any remaining doubt of the Commission's understanding of the term "bona fide operation" is removed when recourse is had to the hearing before the sub-committee of the House Committee on appropriations, where the Commission was seeking an appropriation for the Bureau of Motor Carriers (R. pp. 37-56). Commissioner Eastman, speaking as Chairman of Division 5, the Motor Carrier Division, said:

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Railroad Commission of Texas, but which has operated under an injunction of a Federal Court with the approval of this Court since January 11, 1933.

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How can this Court so easily conclude that petitioner was operating in defiance of the laws of the State of Texas when Section 17 of the Texas Motor Truck Law, Art. 1690(b), Penal Code of Texas, 1925, Acts 42nd Legislature, 1931, p. 480, Chapt. 277, provides penalties, and Sub-section (c) makes the following provision:

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> *Such injunctive relief may be granted upon the application of the Commission, the Attorney General or any District or County Attorney.* No bond shall be required when such injunctive relief is sought upon the application of the Commission, Attorney General or any District or County Attorney. Such relief may be granted in suits for penalties as provided in subdivision (b) of this section, but a suit for penalty shall not be a condition precedent to the injunctive relief provided by this subdivision." (Emphasis ours.)

Surely it must be assumed that the Railroad Commission of Texas, the Attorney General of Texas, or some district or county attorney of this state would have performed his duty and have enjoined petitioner if he were operating "in defiance" of its laws. The Attorney General of Texas was present in the trial of petitioner's case in the district court and represented the Railroad Commission of Texas, and he likewise was under a constitutional oath to support and uphold the constitution and laws of this state, and if petitioner's operation was in defiance of the laws of this state, why did he not enjoin McDonald in that proceeding if nowhere else or at no other time? It is easy to say that petitioner was operating in defiance of the laws of this state, but we submit that it is quite difficult to follow that statement up with any logical reasoning which would lead to any such conclusion.

GROUND NO. II

The Supreme Court of Texas followed by the Court of Civil Appeals of Texas having construed the Texas statute and held that operators similarly situated to petitioner were in "bona fide" operation and entitled to continue to operate until the Interstate Commerce Commission should otherwise order in spite of the Texas statute and having refused to hold that such an operator as petitioner was operating in "defiance" of Texas law is necessarily binding upon the Federal Courts.

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ARGUMENT

Still this Court, utterly disregarding all issues involved in this case except the issue of "bona fide operation," if that issue be involved, and which is by no means conceded, has chosen to determine this case upon its own construction of the Texas Motor Carrier Law, Art. 911(b), Revised Civil Statutes, 1925, Acts of 42nd Legislature, p. 480, chapt. 277, and held that petitioner was not within the proviso of section 206, Motor Carrier Act, 1935, because he was operating, as this Court says, "in defiance of its laws." Such a determination therefore permits this case to turn wholly upon this Court's construction of the Texas Motor Truck law.

There is a very definite and settled rule, as shown by the authorities cited hereinabove and for which this Court needs no citation of authority, that Federal Courts, including the Supreme Court of the United States, are bound by the construction placed upon state constitutions and statutes by the highest court of that state; and we think that rule applies here. The Supreme Court of Texas, followed in a number of cases by Courts of Civil Appeals of Texas, has placed no such construction as that upon the Texas Motor Truck law. In other words, the Supreme Court says that the petitioner was operating in defiance of the laws of Texas, yet the Texas Supreme Court and Courts of Civil Appeals of Texas have entertained utterly no such view. The construction placed upon the Texas statutes by the Texas courts, including the Supreme Court of Texas, and Courts of Civil Appeals of Texas, is binding, as we view it, upon this Court.

Among the authorities cited hereinabove will be found the *Southwestern Greyhound Lines* case, a case by the Supreme Court of Texas, subsequently followed by the Court of Civil Appeals in the Bates, Futch, Peterson, Williams, and Rayburn cases. Bates, Futch, Peterson, Williams, and Rayburn appealed to state courts for temporary injunctions to protect their operations pending determination of their applications before the Interstate Commerce Commission, and were in identically the same position that your petitioner here is in. That is, they had complied with every law or requirement of the State of Texas ex-

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Let us bring again to the attention of this Court the proposition that petitioner could not have been operating in defiance of state laws *because it was established by the record in this case that petitioner had met every requirement of the Texas law except that of obtaining from the Railroad Commission of Texas a so-called state interstate certificate. The Railroad Commission of Texas could not require your petitioner to obtain any such certificate and that fact was early made clear in the administration of the Texas Truck Law* in the case of *Sage v. Baldwin*, 55 Fed. (2d) 968, in which Judge Atwell, writing for a three-judge statutory court, assembled under section 266 of the Judicial Code, said:

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Surely the foregoing opinion is clear and emphatic to the effect that the Railroad Commission of Texas cannot require that an exclusive interstate operator obtain from the Railroad Commission of Texas a certificate of public convenience and necessity. Such has been the law of this state since the *Sage v. Baldwin* case. Every other requirement which the Railroad Commission could possibly make of petitioner had been fully met by petitioner as will be shown by the findings of fact of the trial court in this case.

We trust that this Court will give serious consideration to *Railroad Commission of Texas, et al., v. Bates*, 108 S. W. (2d) 286, in which the court, following the Greyhound Lines case, supra, stated the contention of the appellee Bates, as follows:

"Appellee alleged that he has complied with all these provisions of the act *and is entitled to continue operations without a certificate* until his application has been passed upon by the Interstate Commerce Commission; that he has complied with all the rules and regulations over which the Railroad Commission has jurisdiction, and particularly with respect to the character of vehicles to be used and proper safety lights and equipment, and has furnished all kinds of

insurance required; *but that appellants have arrested him and his drivers, and have threatened to continue to arrest them for any operations unless appellee secures a certificate or permit from the State Commission to operate his trucks on the highways in question;* and that because of such arrests and threatened arrests appellee's business was being irreparably injured; and he prayed for a temporary injunction to be made permanent on final hearing." (Emphasis ours.)

Under such contentions, the Court of Civil Appeals of Texas in following the highest court of our State in disposing of the case said:

"The court also held that in aid of the enforcement of state police regulations, the State Commission might promulgate reasonable rules and regulations for the protection of the highways and their use by the public, and that it might in like manner establish requirements with respect to safety of equipment or standards of equipment, payment of compensation for the use of the highways, qualifications of truck drivers, insurance, and any other matters over which the jurisdiction of the state commission is not in conflict with, nor displaced by, the Federal Act. To that end no doubt the commission may require of each interstate carrier an *application for some sort of certificate or permit to be issued after a certificate of convenience and necessity has been issued by the Interstate Commerce Commission, and to be issued as a matter of right upon proper application after the Interstate Commerce Commission has passed upon and issued its certificate of convenience and necessity.*" (Emphasis ours.)

The Court has here said that the Railroad Commission of Texas under the Texas Truck law could not require an interstate operator to obtain any kind of a certificate or permit under Texas law "until after" the Interstate Commerce Commission had acted upon the application and that if the Interstate Commerce Commission issued a certificate that the Railroad Commission of Texas would be required upon "some sort" of application to issue some character of permit—not a certificate of convenience and necessity but some character of permit—which would in substance amount to no more than a registration, with the Railroad Commission of Texas in order that the Railroad Commission of Texas might enforce such police regulations as were still applicable to interstate operators. Surely this Court is not going to disregard the holding of our state courts with reference to our own State laws and to ascribe to a good law-abiding citizen, such as the petitioner here, law violations when as the record in this case will show the petitioner was able to bring to the hearing and introduce as witnesses his own District Judge, his own Sheriff, Constable, City Marshal, District Attorney, and in fact practically all of the public officials of Ellis County, Texas, his own county. Certainly your petitioner had no intention or any knowledge of violating any law.

Again referring to the Bates case, the court said:

> "Manifestly, if the State Commission cannot be compelled to issue a certificate of convenience and necessity to enable it to enforce its state

police regulations to an interstate carrier already temporarily operating under his pending application to the Interstate Commerce Commission for a permanent certificate, *then the Commission should not and cannot require of such operator a certificate or permit until the Federal right has been made permanent.*" (Emphasis ours.)

We earnestly insist that the construction of a state statute by the highest court in the state should be followed by this Court, and if this rule be given application in this case the original opinion of this Court cannot stand.

GROUND NO. III

The Texas truck law does not now, and has never required, that petitioner have a so-called State Interstate Certificate of Convenience and Necessity, nor any other kind of permit, and any such application makes the Texas statute unconstitutional. Petitioner has not therefore operated in "defiance of any law of this State."

AUTHORITIES

State v. Sugarland Ry. Co., 163 S. W. 1047.
Harris v. Municipal Gas Co., 59 S. W. (2d) 355.
Danciger Oil & Refg. Co. v. Railroad Commission, 49 S. W. (2d) 837.
Buck v. Kuykendall, 267 U. S. 307.
Bush v. Malloy, 267 U. S. 326.

Michigan Public Utilities, etc. v. Duke, 266 U. S. 570.

Smith v. Cahoon, 75 L. Ed. 812.

Sage v. Baldwin, 55 Fed. (2d) 968.

Galveston Truck Lines v. Allen, 289 U. S. 708, 53 Sup. Ct. 694.

Yu Cong Eng v. Trinidad, 271 U. S. 500, 46 Sup. Ct. 619.

Employers Liability cases, 207 U. S. 463, 28 Sup. Ct. 141.

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Wald Storage & Transfer Co. v. Smith, 4 Fed. Supp. 61, affrmed, 54 Sup. Ct. 129.

Beard v. Smith, 4 Fed. Supp. 61, affirmed, 54 Sup. Ct. 129.

Texas Port Carrier Corporation v. Smith, 8 Fed. Supp. 28.

Trade Mark cases, 100 U. S. 550.

Hunter v. Colfax Consolidated Coal Co., 175 Iowa 245, 154 N. W. 1037.

State v. Jack, 69 Kansas 387, 76 Pac. 911, 1 L. R. A. (NS) 167, affirmed, 199 U. S. 372, 26 Sup. Ct. 73.

Williams v. Standard Oil Co., 278 U. S. 235, 49 Sup. Ct. 115, 60 A. L. R. 596.

ARGUMENT

The holding of this Court is that McDonald was violating Texas law on June 1, 1935, and therefore can not come within the "grandfather proviso." The record shows that McDonald was complying and has complied with all Texas police measures. The only thing he has not done which respondents contend he should have done, was that he did not have a certificate of convenience and necessity under Texas law —a so-called "state interstate certificate." Under the three-judge court decision in the Texas case of *Sage v. Baldwin* handed down long before the Federal Act of 1935 was enacted the court in holding that a purely interstate operator did not have to have a state certificate said:

> "Preserving, therefore, the rights of the state and the right of the nation, the respondents will be enjoined from interfering with the operation of the complainants or from arresting them for alleged violation of this law, so far as any rates may be concerned, or so far as any bond securing any shipper may be concerned, *or so far as any certificate of public convenience and necessity may be concerned.*" (Emphasis ours.)

How can McDonald be stigmatized as a law violator for the reason that he had no state certificate when under Texas law he was not required to have such a certificate? *Sage v. Baldwin* is supported by the Buck, Bush, Michigan Public Utilities, Smith and Galveston Truck Line cases.

Your petitioner feels quite earnestly that he has

violated no law, and considerably hurt that he should so easily be convicted of doing anything in defiance of the laws of the state in which he has lived all of his life, and in which he has never stood charged with any violation in all his life. The Texas Truck Law, Art. 911(b), Revised Civil Statutes, 1925, 42nd Legislature, p. 480, Chapt. 277, Section 2, being the Act under construction in *Sage v. Baldwin* and *Galveston Truck Line*, provides:

> "Sec. 2. No motor carrier, as defined in the preceding section, shall operate any motor propelled vehicle for the purpose of the transportation or carriage of property for compensation or hire over any public highway in the state except in accordance with the provision of this Act; provided, however, that nothing in this Act or any provision thereof shall be construed or held to in any manner affect, limit or deprive cities and towns from exercising any of the powers granted them by Chapt. 147, pages 307 to 318, inclusive, of the General Laws of the State of Texas passed by the 33rd Legislature or any amendments thereto."

The term "Motor Carrier" is defined in Section (g) in the following language:

> "(g) The term 'motor carrier' means any person, firm, corporation, company, co-partnership, association, or joint stock association, and their lessees, receivers or trustees appointed by any court whatsoever, owning, controlling, managing, operating or causing to be operated any motor propelled vehicle used in transporting property for compensation or hire over any pub-

lic highway in this state, where in the course of such transportation a highway between two or more incorporated cities, towns, or villages is traversed; provided that the term 'motor carrier' as used in this Act shall not include, and this Act shall not apply to motor vehicles operated exclusively within the incorporated limits of cities or towns."

There is one requirement and only one requirement which would prevent any person from operating a motor propelled vehicle in the transportation of property for hire in this state, any time and to any place which he might desire, except as found in Section 3 of the Texas Truck Law, and which section provides as follows:

> "Sec. 3. No motor carrier shall, after this Act goes into effect, operate as a common carrier without first having obtained from the Commission, under the provisions of this Act, *a certificate of public convenience and necessity pursuant to a finding to the effect that the public convenience and necessity require such operation.* No motor carrier shall, after this Act goes into effect, operate as a contract carrier without first having obtained from the Commission a permit so to do which permit shall not be issued until the applicant shall have in all things complied with the requirements of this Act." (Emphasis ours.)

The foregoing language of the statute is clear, is unambiguous, requires no construction, and is applicable to all carriers alike, both in interstate and intrastate commerce. The provisions of the statute

are not severable. The entire statute depends upon Section 3 as quoted hereinabove. If Section 3 be unconstitutional, then the entire statute must fall because it is not severable.

By the provisions of Section 3, so far as its own language is concerned, every carrier both in interstate and intrastate commerce is required before operating as a carrier for hire to first obtain a certain, definite, and particular kind of an instrument from the Railroad Commission of Texas, namely, a *certificate*, and this certificate must be of a particular kind, namely, *a certificate of convenience and necessity* and there is the mandatory requirement in the statute, as emphasized and quoted above, that this certificate which is required must be issued by the Railroad Commission of Texas "*pursuant to a finding to the effect that the public convenience and necessity* require such operation."

So far as the language of the Act is concerned, the requirement applies alike to all operators of trucks in intrastate and interstate commerce. But to save its constitutionality it must be construed in its relation to the National Government as relating to that which is within the legislative power of the State.

The Railroad Commission of Texas is a creature of statute having that power and only that power that has been delegated to it by the statutes of this state. *State v. Sugarland Ry. Co.*, 163 S. W. 1047; *Harris v. Municipal Gas Co.*, 59 S. W. (2d) 355; *Danciger Oil & Ref. Co. v. Railroad Commission*, 49 S. W. (2d) 837.

We see therefore that neither the statute nor the Railroad Commission of Texas may require of McDonald, your petitioner herein, any kind of a certificate or permit except that particular kind of a certificate or permit as described in Section 3 of the statute.

That the Railroad Commission of Texas, or that the State of Texas, and it has not attempted to do so, cannot require that particular kind of a certificate in the regulation of interstate commerce is too well settled to require argument. *Buck v. Kuykendall*, 267 U. S. 307; *Bush v. Malloy*, 267 U. S. 325; *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570; *Smith v. Cahoon*, 75 L. Ed. 812; *Sage v. Baldwin*, 55 Fed. (2d) 968; *Galveston Truck Line v. Allen*, 289 U. S. 708, 53 Sup. Ct. 694. It is a foregoing and distinct conclusion, therefore, that the Railroad Commission of Texas could not under the Texas Motor Truck Law require that your peitioner have any kind of certificate or permit, *and if it has so attempted to require under the foregoing authorities, the statute must fall as being unconstitutional and in contravention of the Commerce Clause of the Constitution of the United States.*

Some of the federal courts in Texas have tried to do a lot of legislating and carve out of a statute that which is not within the statute and which the legislature clearly never intended, and this must be the only conclusion in view of the clear, plain, and distinct language which the legislature used.

Where the language used in a statute is plain, the

court cannot read words into it that are not found therein, either expressly or by fair implication, even to save its constitutionality, because this would be legislation by the courts and not construction. *Yu Cong Eng v. Trinidad*, 271 U. S. 500, 46 Sup. Ct. 619; *Employers' Liability cases*, 207 U. S. 463, 28 Sup. Ct. 141; *Trade Mark cases*, 100 U. S. 550.

Hence, if the text of an act is unambiguous, as is the case with the Texas Motor Truck Law, it may not be rewritten by the courts to accomplish the purpose of preserving the law. Employers' Liability cases, supra.

The Federal Courts in Texas, in construing the Texas Truck Law, have attempted to restrict its meaning and make the words used in Section 3 of the Texas Truck Law apply in part to interstate carriers by writing out the plain language of the statute and attempting to write in a legislative intent which cannot be found in the plain language of the statute. A court is not permitted to adopt a restricted construction which would be a mere arbitrary decision of the court, as the courts have attempted to do with our truck law, and which in effect would amount to a re-drafting of the law in order to make it conform to that which in the view of the court should have been originally enacted by the legislative body. *State v. Wittles*, 118 Minn. 364, 136 N. W. 883; *Vanderbilt v. Brunton Piano Co.*, 169 Atlantic 117, and where the legislature of a state, as in our Texas Motor Truck Law, has made no limitation or exception the legal presumption is that it intended to

make none, and it would be judicial legislation for a court to do so.

The federal courts have theretofore in such cases as *Wald Storage & Transfer Co. v. Smith*, 4 Fed. Supp. 61, affirmed at 54 Sup. Ct. 129; *Beard v. Smith*, 4 Fed. Supp. 61, affirmed at 54 Sup. Ct. 129, and *Texas Port Carrier Corporation v. Smith*, 8 Fed. Supp. 28, substantially declared the Texas Motor Carrier Act unconstitutional because the courts in those cases have held that no requirement should be made of an exclusive interstate carrier that he have a certificate of convenience and necessity made "pursuant to a finding to the effect that the public convenience and necessity required such operation" but the courts have by their attempted construction and by invasion of the legislative field, as applied to exculsive interstate carriers, written those words out of the Texas Truck Law, and which, under the authorities cited hereinabove, the courts have utterly no authority to do.

The whole statute ought to fall as being unconstitutional as it is unconstitutional because under the plain language of the Act, which is not ambiguous, which is clear, which requires no interpretation or construction, the Act applies to all carriers alike and is not severable.

However, we do not insist before this Court upon this Court's making any such constitutional determination in this case, although this Court ought to give serious consideration to such matters before finding that petitioner is a law violator. Rather we resort to the rule of favorable construction as it finds its

application in the case of state statutes in their relation to the National Government. Such statutes will be construed to cover only the field appropriate to state action. *Hunter v. Colfax Consolidated Coal Co.*, 175 Iowa 245, 154 N. W. 1037, 15 Anno. cases 1917 E. 903; *State v. Jack*, 69 Kansas 387, 76 Pac. 911, 1 L. R. A. (NS) 167, affirmed in 199 U. S. 372, 26 Sup. Ct. 73, and many other cases.

It is unnecessary to cite authority for the foregoing proposition as well as for the further proposition that where a statute is open to two constructions, one of which will make the same constitutional and the other which would make it unconstitutional that courts will adopt that construction of the statute which will uphold the constitutionality of the statute. That is what the courts ought to do in the case of the Texas Motor Truck law without convicting McDonald of being a law violator. In other words, the courts must hold that the Texas Motor Truck Law is applicable to intrastate commerce and not interstate commerce; otherwise the Texas Motor Truck Law must fall as being unconstitutional, because so far as its plain language is concerned, it applies to the interstate operator the same as it applies to the intrastate operator.

The statute is not severable nor divisible. A consideration of the entire Act shows that the entire Act revolves around section 3, and there is utterly no way that you can read section 3 so as to read in the words "pursuant to a finding to the effect that public convenience and necessity require such operation" as

to intrastate operators and at the will of the courts read those words out of the statute as applied to interstate operators.

We realize, of course, that where a statute is severable and divisible that minor and unimportant parts of the Act which may be unconstitutional may be held to be unconstitutional without affecting the validity of the remaining portions of the Act, and most statutes do contain the so-called saving clauses as the Texas Motor Truck law contains such a clause, but in neither event can the Texas Motor Truck law be saved from unconstitutionality if section 3 of the Act be given effect and be given the interpretation which the Federal Courts have heretofore attempted to give it, but which we have heretofore attempted to show in this argument that the state courts by necessary implication from their construction of the Act do not agree.

The courts have frequently had occasion to decide that unimportant portions of general statutes are not of sufficient importance to render the entire act unconstitutional. That is not the case here, however, because as stated elsewhere herein, the entire Texas Truck Law revolves about section 3 of that Act. It may be stated as an additional test for determining whether the provisions of a statute are severable *that whenever the ruling feature of a law or the essential part from which the remaining portions take their cast, is unconstitutional the act must fall as a whole. Williams v. Standard Oil Company*, 278 U. S. 235, 49 Sup. Ct. 115, 60 A. L. R. 596.

The Texas Motor Truck Law, therefore, simply does not apply to your petitioner. He is not a violator of the law; neither is he operating in defiance of the law. To so hold is to hold that the Texas Motor Truck Law is unconstitutional.

It is not necessary to hold that the Texas Motor Truck law is unconstitutional, but rather that favorable construction should be given to the Act in its relation to the National Government as being intended to cover only the field appropriate to action by the state of Texas, that is, intrastate commerce.

This Honorable Court has simply committed manifest and obvious error in its ruling.

Let's test the applicability of the Texas Truck Law to your petitioner by assuming a criminal prosecution. If a person is guilty of an offense, there must be some place to which such a person can turn to know whether he is violating a law or not. In this state that place is the Penal Code of Texas, it being provided in Art. 3 of the Texas Penal Code as follows:

> "Art. 3. Penalties must be affixed by written law. In order that the system of penal law in force in this State may be complete within itself, and that no system of foreign laws, written or unwritten, may be appealed to, it is declared that no person shall be punished for any act or omission, unless the same is made a penal offense, and a penalty is affixed thereto by the written law of this state."

Keep in mind the requirements of section 3 as heretofore set out, as well as the provisions of Art. 3

of the Penal Code. Keep in mind especially that the only kind of a certificate which the state has so far prescribed as being prerequisite to operating as a common carrier for hire over the highways of Texas is that peculiar kind of a certificate which is called a certificate of convenience and necessity and which must be made "pursuant to a finding to the effect that the public convenience and necessity require such operation."

Suppose that the state had wished to proceed against your petitioner (which, by the way the state has never attempted to do as shown by this record) because your petitioner had not obtained that peculiar kind of an instrument as required by the written law of this state. The complaint would necessarily have to be in substance that on or about a certain date A. E. McDonald did then and there operate over a certain highway (naming it) in this state as a common carrier, motor carrier for hire "without first having obtained from the Railroad Commission of Texas a certificate of public convenience and necessity pursuant to a finding to the effect that public convenience and necessity requires such operation." 1 Code Criminal Procedure, 1925, Art. 396, note 13.

Of course the attorney general, the Railroad Commission of Texas, any law enforcement officer employed by the Railroad Commission of Texas, any county or district attorney in Texas, as well as any sheriff or any constable in the state of Texas, could have filed such a complaint but they never filed one,

and if they had filed such complaint they never could have established under any circumstances that the Railroad Commission of Texas had ever issued to anybody any such certificate, or that they could have issued to anybody any such peculiar certificate because the courts had theretofore told the Railroad Commission of Texas that they could not consider nor make a finding to the effect that public convenience and necessity require such operation, and never since the *Galveston Truck Line* case, 2 Fed. Supp. 288, 289 U. S. 708, has the Railroad Commission of Texas in administering the Texas truck law ever attempted to require any interstate operator to prove convenience and necessity. The complaint must therefore and certainly would fall. If such a complaint could not be sustained in Texas, and surely it could not be sustained under the decisions cited herein, then your petitioner is not a law violator and has not operated in defiance of the laws of this state. With all due respect and a feeling of humility, we are compelled to say that your Honorable Court has simply committed manifest and obvious error in so finding. We further most humbly beseech this Court to correct this error or sustain its conclusion by any logical process.

WHEREFORE, your petitioner respectfully prays that this motion for rehearing be granted and that upon reconsideration of this case that the judgment of the Circuit Court of Appeals be overruled, and that the judgment of the trial court herein be in all things affirmed.

Respectfully submitted,

T. S. CHRISTOPHER,
Counsel for Petitioner.

PRICE AND CHRISTOPHER,
LLOYD E. PRICE,
Of Counsel.

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Supreme Court, U. S.
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No. 55

In the Supreme Court of the United States

OCTOBER TERM, 1938

A. E. McDONALD, PETITIONER

v.

ERNEST O. THOMPSON ET AL., RESPONDENTS

PETITION OF INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING OF A. E. McDONALD, PETITIONER

DANIEL W. KNOWLTON,
E. M. REIDY,
For Interstate Commerce Commission.

DECEMBER 30, 1938.

In the Supreme Court of the United States

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A. E. MCDONALD, PETITIONER

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PETITION OF INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING OF A. E. McDONALD, PETITIONER

The opinion of this Court reads in part as follows:

> * * * The expression, "in bona fide operation", suggests absence of evasion, excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential or simulated service, and in context implies recognition of the power of the State to withhold or condition the use of its highways in the business of transportation for hire. Plainly the proviso does not extend to one operating as a common carrier on public highways of a State in defiance of its laws.
>
> As petitioner is not protected in his operation as a common carrier by the proviso,

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we need not consider to what extent, if at all, the federal Motor Carrier Act superseded the state Motor Truck Law, or any other question presented by petitioner.

In the administration of the Motor Carrier Act, 1935, the Interstate Commerce Commission was confronted at the outset with approximately 90,000 applications which were filed under the second proviso of Section 206 (a) and the first proviso of Section 209 (a) for authority to operate in interstate commerce. Each of these applications involves a finding by the Commission as to whether or not the applicant was operating in good faith on the statutory date and has continued such operations since. Because of the volume of its task the Commission has been unable as yet to pass upon all of these applications. Among those so filed with the Commission and thus undetermined is the application of the present petitioner. In many of these cases question has arisen as to whether the applicant conformed during the statutory period with various laws of the various States through which applicant operated, the contention having been made that a violation of a State statute by an applicant constitutes a breach of good faith, and the operation thus was not a "bona fide operation."

The Commission first announced its interpretation of this phrase in *Slagle, Contract Carrier Application*, 2 M. C. C. 127. As appears from the report in that case, the Commission had the benefit

of the participation in the case of a large number of parties representing almost every conceivable interest, including the respondents in this case and their present counsel. The Commission adopted the unusual course of issuing a preliminary report expressing its tentative conclusions, then inviting all interested persons and public bodies, without formal intervention, to file exceptions to that report. It received and considered numerous briefs and heard oral arguments concerning its tentative conclusions before its final conclusion was reached.

For the convenience of the Court the entire text of the Commission's discussion in the *Slagle case* of the point here under consideration is annexed hereto in an appendix. In effect its conclusions were that mere non-compliance with a State law is not by itself sufficient to brand a carrier's operations with the stigma of bad faith; that there must be additional elements, such as operations begun, as a mere show, with knowledge of impending legislation, not in pursuance of any well conceived plan of furnishing transportation service, but for the purpose of securing rights to operate having in themselves a money value, or operations conducted surreptitiously or involving some other element of pretense or concealment for the purpose of preventing State authorities from having the opportunity of enforcing statutory requirements. The right of the States to enforce their own valid laws affecting interstate carriers was emphasized, but it was pointed out that for this Commission to

determine the meaning or validity of State laws and regulations in connection with the issue of good faith, would require the exercise of its part of judicial functions.

In a series of cases following the *Slagle case*, other illustrations of conduct on the part of carriers which failed to measure up to the standard of good faith appeared. Some twenty-five cases have been decided by the Commission in which the general principles announced in the *Slagle case* were adopted and applied. A large number of other cases have also been decided on the same principles without specific discussion of the point.

In brief, the opinion at which the Commission arrived was that it is not inconsistent with good faith for a carrier in innocent ignorance, or through acquiescence of State authorities, or because the State law was dormant, or through honest doubt of the validity or applicability of a State law to fail to comply therewith. It has considered that prior to the passage of the Act, cost of the States had undertaken to regulate to some extent motor carriers engaged in intrastate commerce, and some had undertaken to extend such regulations in various respects to those engaged in interstate or foreign commerce; that there were a great variety of such laws and like variations in enforcement; that some such laws were ambiguous and obedience to them was dependent upon the proper interpretation thereof. In other cases the constitutionality of State laws, particularly as applicable to interstate

or foreign commerce, had been challenged or was extremely doubtful. It was further pointed out that it was frequently difficult for a carrier operating in several States to ascertain that statutes affecting him had been enacted or to keep abreast of the fluctuating regulations of the various State Commissions having the effect of law. In other cases the State statutes, as applicable to interstate carriers, were dormant and neglected. The Commission concluded that Congress had this situation in mind when it enacted the Motor Carrier Act, and consequently made no positive or definite declaration that any violation of a State law would suffice to deny an applicant the benefit of the "grandfather" clause. On the contrary, it omitted any reference to compliance with State laws in this connection, and cared for the subject in a different way, i. e. by imposing upon the Interstate Commerce Commission the duty to ascertain from consideration of all the circumstances in each case whether the operation was or was not in good faith. It further held that a contrary view would cast upon it the inevitable duty of construing State laws, of determining their validity in respect of interstate or foreign motor transportation, and of determining their applicability to such commerce. These are judicial functions which the Commission determined that it had no authority to perform.

A striking illustration of the practical difficulties which would attend the attempt by this Commission to apply a rule that non-compliance with every pro-

vision of a State law is a breach of good faith is found in the present case. The State law here in question specifically requires proof of the convenience and necessity of common carrier motor operations over the highways of that State. (See Sec. 3 of Texas Act set forth in the brief of Interstate Commerce Commission herein, p. 3.) That is the only requirement in respect of operating authority contained in the statute which is applicable to petitioner. Yet the respondents, the Railroad Commission of Texas, charged with the duty of enforcing that Act, aver in their answer (Tr. p. 32) that the Railroad Commission "will not require applicant (McDonald) to prove that public convenience and necessity requires the proposed service." If the fact of mere non-observance of a State law is to be the criterion of the carrier's rights under the federal Act, the Interstate Commerce Commission, in passing upon an applicant's case, may find itself confronted by the question whether his rights are to be measured by compliance with the literal terms of the Texas Act or with whatever requirements may be made by State officials whether at variance with the Act or no.

The converse of this situation has also arisen in many instances when the requirements of State officials are challenged as being in excess of their powers conferred by the State laws under which they are acting.

It is apparent that the determination of such questions involves the exercise of powers which this

Commission has felt are beyond its jurisdiction as an administrative agency of Government. It can decide such questions quite properly under the principles which it adopted in the Slagle and other cases. But if it is called upon to decide the constitutionality, validity, and meaning of State laws, and the propriety of the interpretations and acts of the officials enforcing them, it doubts both its jurisdiction and its ability to perform the task.

For these reasons the Commission has felt it desirable to file this petition, as amicus curiae, in support of McDonald's petition for rehearing, to present to this Court a statement of some of the problems with which the Commission is confronted, and respectfully to urge that a reconsideration be had of the important point involved in connection with the term "bona fide operation" hereinabove stated.

The Commission has proceeded upon the assumption that the question of the good faith of a motor carrier operation was one of fact, the determination of which in the first instance was entrusted to the Commission by the statute. Sound and uniform administration of the Act would seem to require that the Commission first determine that question in the many applications pending before it. That course has been followed in respect of many other subject matters heretofore committed to the Commission's jurisdiction, such as rate reasonableness (once a court question as to damage), unjust discrimination, public interest, and the like.

A difference undoubtedly exists, at least as to the extent to which judicial review may be had of a given question, whether it has been committed to the Commission by statute or whether it has not. This Court, in *Shields* v. *Utah Idaho Central R. R. Co.,* No. 28 October term 1938, decided on December 5, 1938, said:

> With respect to that question, unlike the case presented in *United States* v. *Idaho,* 298 U. S. 105, where the Interstate Commerce Commission was denied the authority to determine the character of the trackage in question, the Commission in this instance was expressly directed to make the determination. As this authority was validly conferred upon the Commission, the question on judicial review would be simply whether the Commission had acted within its authority.

This being so, those whose applications for operating author v are decided by the Commission according to a uniform rule and course of decision may find themselves in different status from those whose rights are determined by the various courts which may have no uniform conception of the problem or the standards by which it is to be solved.

If the Commission has been wrong in the assumptions it has made, or in its conclusions expressed in the *Slagle case,* further questions arise. Among them is whether mere noncompliance with the laws of a State, under whatever circumstances, is defiance of those laws, or whether "defiance" is

limited to the intentional and willful violation of a statute known to be properly and legally applicable to the person involved. The many variations of State statutes and regulations in existence, the doubt as to their applicability, their dormant state in many cases, make the problem a difficult one.

A further question is as to whether the statement in the opinion that the expression, "in bona fide operation", in context implies recognition of the power of the State to withhold or condition the use of its highways in the business of transportation for hire applies to transportation in interstate or foreign commerce. If it applies to the use of State highways in interstate commerce, the opinion of the Court would answer the question the answer to which it expressly withholds in the succeeding paragraph of the opinion. The Court there stated that it need not consider to what extent, if at all, the Federal Motor Carrier Act superseded the State Motor Truck Law. However, if the phrase "in bona fide operation" is to imply recognition of the power of the State to withhold or condition the use of its highways in the business of transportation for hire in interstate commerce, the question of the supersession of the State laws by the federal law is thereby decided.

Many motor carriers have a vital interest in the problem presented. The interest of the States and of the public therein is widespread and real. For these reasons, in addition to that of the ad-

ministrative situation facing the Commission, it is respectfully requested that the petition for rehearing of petitioner, A. E. McDonald, be granted.

DANIEL W. KNOWLTON,
E. M. REIDY,
For Interstate Commerce Commission.

DECEMBER 30, 1938.

I, Daniel W. Knowlton, Chief Counsel for the Interstate Commerce Commission, Amicus Curiae in the above entitled cause, and a member of the Bar of the Supreme Court of the United States, do hereby certify that the foregoing petition in support of petition for rehearing is presented to the Court in good faith and is not presented for the purpose of delay.

DANIEL W. KNOWLTON,
Chief Counsel.

APPENDIX

Excerpt from *Slagle Contract Carrier Application, 2 M. C. C. 127, 138.*

> Under the interpretation of the act urged upon us by some of the State authorities and by the railroads, we would be forced to deny the application in its entirety, because of the failure of applicant to establish the fact of compliance, on the "grandfather" date and to some extent thereafter, with laws of these two States involving the right to operate in interstate commerce therein, one of which States must be traversed in all of his operations. It may be that some of these protestants would concede that applicant exhibited sufficient diligence and willingness to comply with the applicable State laws to warrant a finding that he acted in good faith, but the above is in general, we believe, a correct statement of protestants' position. Is this a sound view of the law, and, if not, how should it be interpreted?
>
> Prior to the passage of the act, most of the States had undertaken to regulate to some extent motor carriers engaged in intrastate commerce, and some had undertaken to extend the regulation in various respects to those engaged in interstate or foreign commerce. There were a great variety of such laws and like variations in enforcement. Enforcement was vigorous in some States and lax in others, and, as was natural, laxity was more prevalent as to interstate opera-

tions. In the absence of Federal regulation, the situation was a most difficult one for the States, which was one of the reasons why their regulatory authorities very generally favored such regulation. The records show that Congress was fully informed in regard to this situation. It might readily, in clear and unmistakable language, have made compliance with the State laws a prerequisite to rights under the "grandfather" clauses, and have indicated how we should determine the fact of compliance or noncompliance. This, however, it did not do. Instead, it employed the phrase "bona fide operation," making registration "under any code of fair competition" evidence of such operation on June 1 or July 1, 1935, but saying nothing about State laws, which were not mentioned in committee reports or debates, in connection with the phrase "bona fide operation."

At two places in the act Congress made specific provision for compliance with State laws as a prerequisite to obtaining a privilege. Under section 203 (b) (8) a carrier of passengers is not entitled to an exemption that he might otherwise be accorded unless he is "lawfully engaged in the intrastate transportation of passengers in accordance with the laws of each State having jurisdiction." Under section 206 (a) a carrier who has procured a certificate under State laws authorizing intrastate common-carrier service is relieved of the requirement of making proof of public convenience and necessity for conducting the same operations in interstate commerce. It seems unlikely that if Congress had intended to make compliance with State laws a condition precedent to "grandfather" privileges, it would have failed to make the same specific provisions that it did in respect to other privileges.

It seems clear that protestants' interpretation of the act would, in substance and practical effect, require the exercise on our part of judicial functions in respect of State laws. That is to say, in the absence of either admission by an applicant of law violation or proper proof of conviction of violation in a court of competent jurisdiction, the responsibility of determining the matter would be upon us. The act makes it a prerequisite to a grant of a certificate or a permit under the "grandfather" clauses, not only that applicant was "in bona fide operation" on the date specified, but also that it "has so operated since that time." It follows that, in the absence of admissions or convictions, it would be necessary for us to examine into the conduct of an applicant with reference to applicable State laws over a period of time, which might be long. To determine the fact of compliance or noncompliance, it would be our responsibility, first, to ascertain what the State law is; second, to construe that law; and third, to apply it as construed to the facts of the case. The responsibility to determine whether a law has been violated would also, presumably, carry with it a responsibility to determine whether the law itself is valid, for a statute without legal force could not operate to penalize one who failed to comply therewith. Protestants refer to no provision of the act which would imply that we have such broad responsibility and authority in the interpretation and application of State statutes, and we find no such provision.

What might often be involved in such a task is well illustrated by applicant's situation here with respect to the law of Iowa. Whether or not the applicant violated the law of that State is dependent, for one

thing, upon whether he was a contract carrier or a common carrier. At the time he began operations in Iowa, he thought that he was a contract carrier, and he was still of that opinion when he filed his application with us under the "grandfather" clause. We have found that, under the definitions in the act he was and is a common carrier, but whether he was and is such a carrier, rather than a contract carrier, under the statutes of Iowa is another matter. It would require careful consideration of those statutes and interpretation of their provisions. If applicant actually was, under the Iowa law, what he believed himself to be, namely, a contract carrier, he did not violate the law of that State, and at no time prior to this proceeding, apparently, did the State authorities undertake to question his status in this respect.

Moreover, where the fact of noncompliance with State laws is admitted by an applicant or properly proved to us, we cannot accept protestants' contention that this fact alone requires denial of an application under the "grandfather" clause. The words "bona fide" certainly make it necessary to consider also the mental attitude of the offender for, where good faith is involved, the maxim "ignorance of the law is no excuse" loses its force. We cannot ignore the facts that it has sometimes been difficult for motor carriers to keep fully informed in regard to the requirements of State laws, that some States have permitted rather general disregard of certain requirements, and that operators might in good faith challenge the validity of some State statutes affecting interstate commerce. It has, for example, been held repeatedly that a State cannot prohibit or obstruct interstate transporta-

tion by motor vehicle on the ground that the existing similar facilities are adequate. *Buck* v. *Kuykendall*, 267 U. S. 307; *Bush* v. *Malloy*, 267 U. S. 317; *Sprout* v. *South Bend*, 277 U. S. 163. Nor, presumably, can a State accomplish the same result through indirection, by assuming to base its action on other and valid grounds which the facts do not actually support.

In the light of the reasons stated for believing that Congress could not have intended the interpretation of the law urged upon us by protestants, the lack of any clear delegation of authority and responsibility to try in this connection the question of whether State laws have been violated, and the circumstances under which various failures to comply with State laws may have occurred, we conclude that the fact that an applicant under the "grandfather" clause has not complied with State laws is not by itself sufficient to bar his right to authority under that provision of the act.

Protestants argue vigorously against this conclusion, and urge that it amounts to condoning and encouraging violations of the laws of the States, that it leaves the States without any effective method of preventing persistent violators of their laws from obtaining authority to operate within their borders in interstate or foreign commerce, and that for these reasons it is inconsistent with that portion of the declaration of the policy of Congress in section 202 (a) wherein cooperation "with the several States and the duly authorized officials thereof" is required. However, for reasons next discussed we cannot agree that our conclusion herein will have the effect which protestants suggest.

To the extent that State laws are properly applicable to interstate operations they can be enforced by the States, and we can assume that they have been and will be so enforced. Infractions do not, of course, always concern the right to operate. However, in considering the action of the States in enforcement of certain classes of their statutes, the courts have sustained repeatedly their right to forbid operations within their borders in interstate or foreign commerce, until such time as compliance with such laws has been effected. In the event of the failure of an operator to comply with such State statutes, the States have the power to stop his operations, and it is a reasonable assumption that in proper cases they have exercised in the past, and in the future will continue to exercise, such power. Our conclusions in this or any other proceedings cannot affect this right of the States.

Having determined that "bona fide" as used in the act does not mean that an operator must prove compliance with State laws in his operations, there remains for consideration the reasonable interpretation which is to be placed upon this language. The Latin words "bona fide" mean "in good faith." Webster's New International Dictionary defines "bona fide" as "in or with good faith; without fraud or deceit; real or really; actual or actually; genuine or genuinely." As defined in Black's Law Dictionary, the words mean "in or with good faith; honestly, openly, and sincerely; without deceit or fraud." The Supreme Court in *Ware* v. *Hylton,* 3 U. S. 199, 241, defined them as follows:

"Bona fide is a legal technical expression; and the law of Great Britain and this coun-

try has annexed a certain idea to it. It is a term used in statutes in England, and in acts of Assembly of all the States, and signifies a thing done really, with a good faith, without fraud, or deceit, or collusion, or trust."

The Supreme Court of the State of Washington, in *State ex rel Great Northern Ry. Co.* v. *Dept. of Pub. Wks.*, 219 Pac. 878, considered an appeal from an order of the Department of Public Works granting a certificate of convenience and necessity to a certain motor carrier. The application was granted upon the ground that the carrier "was actually operating in good faith over the route on January 15, 1921," that date being the statutory date determining rights under the "grandfather" clause in the State act. The court said:

"As we read the Act, the particular provision now under consideration was intended to give a preference right to all operators in good faith, who had been operating without knowledge that the Legislature would so act, and to deny a preference right to those who, after the Legislature began the consideration of the subject, in bad faith commenced to operate for the purpose of forestalling the legislative action."

We are clear that one purpose of the use of the words "bona fide operation" was to deny rights under the "grandfather" clauses to those who, with knowledge of the impending legislation, should make a show of commencing operations, not in pursuance of any well-conceived plan of furnishing transportation service, but for the purpose of thereby securing rights to operate having in themselves a money value. The words may properly be given an even broader applica-

tion to exclude operations conducted surreptitiously or in disguise or involving some other element of pretense or concealment for the purpose of preventing State authorities from having the opportunity of enforcing statutory requirements.

The question, as we see it, is of fact rather than law. Were the operations openly conducted, without any element of pretense, disguise, or concealment, and in such a manner as to indicate a real intent to conduct and maintain a transportation business? Operations so conducted are the "bona fide" operations contemplated by the act. Moreover, where applicant has established the fact of actual operations, not only conducted on the "grandfather" date but continuously maintained thereafter, we think we may fairly assume that they were "bona fide," unless the contrary is shown. In other words, a prima facie case has been established, and the burden is upon protestants having knowledge of the operations to produce for our consideration the evidence of lack of good faith.

U. S. GOVERNMENT PRINTING OFFICE: 1939

SUPREME COURT OF THE UNITED STATES.

No. 55.—October Term, 1938.

A. E. McDonald, Petitioner,
vs.
Ernest O. Thompson, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 5, 1938.]

Mr. Justice Butler delivered the opinion of the Court.

Petitioner brought this suit in the federal court for the northern district of Texas against the members of the Texas Railroad Commission and its enforcement officers to enjoin them from enforcing against him the state Motor Truck Law.[1] Respondents answered; there was a trial; the court made findings of fact, stated its conclusions of law, and entered a decree permanently enjoining respondents from interfering with petitioner's business in interstate transportation. The circuit court of appeals reversed and remanded with directions to dismiss the bill. 95 F. (2d) 937. This Court granted a writ of certiorari. — U. S. —.

Section 3 of the state law requires every carrier of property by motor for hire over public highways of the State to obtain from the Railroad Commission a certificate of convenience and necessity. Section 4 makes it the duty of the commission to regulate the transportation, to prescribe rules for safety of carriers' operations, and to supervise all matters affecting relationships between the carriers and the public.

The federal Motor Carrier Act, 1935,[2] § 206(a), declares that no common carrier by motor vehicle subject to its provisions shall engage in interstate commerce unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing the operation. A proviso in that section declares that, if any such carrier "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935," over routes for which application is made

[1] Acts Reg. Sess., 42d Leg., 1931, c. 277; Vernon's Tex. Ann. Civ. St., Art. 911b.

[2] Act of August 9, 1935, 49 Stat. 543, 551; 49 U. S. C., § 306(a).

and has so operated since that time, the commission shall issue the certificate without requiring further proof that public convenience and necessity will be served by the carrier's operation. Pending determination of the application, the applicant is authorized to continue operations.

Since some time before the passage of the Act, petitioner has been continuously using Texas highways in interstate transportation of property by motor vehicle for hire. Claiming to have been in bona fide operation as contemplated by the proviso, he made timely application to the Interstate Commerce Commission for a certificate authorizing him to continue to operate over the highways he has been using. The application is still pending, and petitioner insists that, notwithstanding state law, he is entitled to continue operations under the proviso. The question first to be decided is whether his claim of bona fide operation is well founded.

In May of 1934 he applied to the state commission for a certificate authorizing operation as a common carrier in interstate commerce. July 14, 1934, the commission denied the application on the ground that the proposed operations would subject the highways named in it to excessive burden and endanger and interfere with ordinary use by the public. Petitioner appealed to the district court of Travis county and obtained a decree enjoining the commission from interfering with his operations. The court of civil appeals, January 8, 1936, reversed and dissolved the injunction. 90 S. W. (2d) 581. Thus it appears that petitioner's operations have been without authority of the Texas commission and, unless within the proviso of the federal Act, without authority of federal law.

Exact definition of "bona fide operation" is not necessary. As the Act is remedial and to be construed liberally, the proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms. *Piedmont & Northern Ry.* v. *Comm'n.*, 286 U. S. 299, 311. To limit the meaning to mere physical operation would be to eliminate "bona fide". That would be contrary to the rule that all words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent. *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208. *Ex Parte Public Bank*, 278 U. S. 101, 104. There is nothing to justify rejection of these qualifying words. The expression, "in bona fide operation", suggests absence of evasion, excludes the idea that mere

ability to serve as a common carrier is enough, includes actual rather than potential or simulated service, and in context implies recognition of the power of the State to withhold or condition the use of its highways in the business of transportation for hire. Plainly the proviso does not extend to one operating as a common carrier on public highways of a State in defiance of its laws.

As petitioner is not protected in his operation as a common carrier by the proviso, we need not consider to what extent, if at all, the federal Motor Carrier Act superseded the state Motor Truck Law, or any other question presented by petitioner.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.